# (14,731 and 14,795.)

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1894.**

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No. 220.

THE RICHMOND SILVER MINING COMPANY, PLAINTIFF IN ERROR,

*vs.*

SEBASTIAN KOENIGSBERGER, ADMINISTRATOR OF VICTOR DORNE, DECEASED.

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**FILED JULY 10, 1891.**

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No. 260.

SEBASTIAN KOENIGSBERGER, ADMINISTRATOR OF VICTOR DORNE, DECEASED, PLAINTIFF IN ERROR,

*vs.*

THE RICHMOND SILVER MINING COMPANY.

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**FILED AUGUST 11, 1891.**

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1894.

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*a* Pleas before the circuit court of the United States for the district of South Dakota at the April, July adjourned, and October terms, one thousand eight hundred and ninety, and the April term, one thousand eight hundred and ninety-one.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant and Appellant.
} Transcript of Record.

Be it remembered that on the 17th day of March, A. D. 1890, there was filed in the said circuit court by the clerk of the supreme court within and for the State of South Dakota and on behalf of the defendant above named the judgment-roll, under certificate of the clerk of the district court in and for Lawrence county, D. T.; the assignment of errors; the notice of motion to dismiss appeal and affidavit of Eben W. Martin; the motion to transfer the cause to the circuit court of the United States, district of South Dakota, and resistance of said motion, together with the certificate of the clerk of the supreme court aforesaid and a certified copy of the order of said supreme court transferring the cause to this court, said judgment-roll and the several papers above described being in words and figures following, to wit:

1 TERRITORY OF DAKOTA, } *ss.*:
*County of Lawrence,* }

I hereby certify and return that the annexed summons came into my hands on the 17th day of October, A. D. 1883, and that I served the same on The Richmond Silver Mining Company, defendant, personally, by delivering to and leaving a true copy thereof with W. B. Hammond, superintendant and managing ag't, in Lawrence county, Dakota Territory, on the 29th day of October, A. D. 1883.

JOHN MANNING,
*Sheriff of Lawrence County, D. T.,*
By A. A. RAYMOND, *Deputy.*

TERRITORY OF DAKOTA, } *ss.*:
*First Judicial District,* }

In the District Court in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant.

The Territory of Dakota sends greeting to the Richmond Silver Mining Company, a corporation, defendant:

You are hereby summoned and required to answer the complaint of Victor Dorne, plaintiff, which will be filed in the office of the clerk of the district court within and for said Lawrence county, at

Deadwood, D. T., and to serve a copy of your answer on the subscribers at their office, in the city of Deadwood, D. T., within
2 thirty days after the service of this summons, exclusive of the day of service, or the plaintiff will take judgment against you for fifteen thousand dollars, besides costs.

G. C. MOODY & F. J. WASHABAUGH,
*Plaintiff's Attorneys.*

E. W. MARTIN.

Dated Deadwood, D. T., October 16th, 1883.

(Endorsed:) Territory of Dakota, Lawrence county. In district court. Victor Dorne *vs.* Richmond Silver Mining Company, def't. Summons. Money demand. Complaint filed. E. W. Martin & G. C. Moody & F. J. Washabaugh, attorneys. Filed Dec. 11th, 1883. A. R. Z. Dawson, clerk.

In District Court, First Judicial District, Territory of Dakota, in and for Lawrence Co.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant. } Amended Complaint.

The plaintiff, Victor Dorne, complains of the defendant, The Richmond Silver Mining Company, and alleges—

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York and duly authorized and empowered to transact business in the Terri-
3 tory of Dakota, and that at the times hereinafter mentioned the said defendant was such corporation so organized and existing and authorized and empowered as aforesaid to contract as hereinafter alleged.

The plaintiff further alleges that on the 11th day of December, 1882, the plaintiff, at the special instance and request of the defendant, bargained, sold, and conveyed to said defendant the undivided one-seventh ($\frac{1}{7}$) of two-thirds ($\frac{2}{3}$) of the Richmond and Eureka lodes and mining claims, and on that day made, executed, and delivered to said defendant, through its president, a deed of conveyance therefor, which was in full payment for the transfer and delivery to said plaintiff of the property and stock hereinafter mentioned.

Plaintiff further alleges that for and in consideration of said bargain, sale, and conveyance and which was in full payment therefor, as aforesaid, the said defendant then and there promised and agreed with the said plaintiff to transfer and deliver to the said plaintiff fourteen thousand two hundred and eighty-five and $\frac{5}{7}$ (14,285$\frac{5}{7}$) shares of the capital stock of the said Richmond Silver Mining Company, the said defendant corporation, and agreed then and there to transfer and deliver the same to him, the said plaintiff, within a reasonable time thereafter, to wit, within three weeks from the said 11th day of December, 1882.

The plaintiff further alleges that the said defendant, in pursuance of said agreement and as a part consideration for such sale and conveyance, transferred and delivered to this plaintiff three thousand five hundred (3,500) shares of such capital stock of said defendant corporation and no more, and there remains due the plaintiff
4 from said defendant, so as aforesaid agreed to be delivered, ten thousand seven hundred and eighty-five and $\frac{5}{7}$ (10,785$\frac{5}{7}$) shares of said capital stock.

Plaintiff further alleges that he has often requested and has duly demanded of said defendant the transfer and delivery to him of the said number of shares thus remaining due to him as aforesaid, but the defendant, though often requested, has failed, neglected, and refused to deliver or transfer to this plaintiff any other or further shares of the capital stock of the said company, as it had agreed to do as aforesaid.

Plaintiff further alleges upon information and belief that the said company, the defendant corporation, has sold and transferred all its capital stock and the whole number of shares thereof and thus put it out of its power to comply with said agreement to deliver said stock as aforesaid.

Plaintiff further alleges that the value of said capital stock, the consideration of said sale and conveyance as aforesaid, and which was thus fully paid for, is, and was at the time when it was so as aforesaid agreed to be delivered, and has at all times since been, of the value of more than fifteen thousand (15,000) dollars, and this plaintiff has been damaged by the defendant's failure to transfer and deliver such shares of stock so agreed to be delivered as aforesaid in the sum of more than fifteen thousand (15,000) dollars, and there is now due and owing from the said defendant to the said plaintiff, by reason of the premises aforesaid, the full and just sum of fifteen thousand (15,000) dollars.

5 Wherefore plaintiff demands judgment against said defendant for the sum of fifteen thousand (15,000) dollars and interest and the costs of this action.

EBEN W. MARTIN,
G. C. MOODY, AND
FRANK J. WASHABAUGH,
*Attorneys for Plaintiff.*

TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

Victor Dorne, being duly sworn, deposes and says he is the plaintiff in this action; he has read the foregoing complaint, knows the contents thereof, and the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

VICTOR DORNE.

Subscribed and sworn to before me this 26th day of December, A. D. 1883.

S. H. HOUGHTON,
*Notary Public.*

[SEAL.]

(Endorsed:) Original. In district court. Victor Dorne *vs.* Richmond Silver Mining Company. Amended complaint. Due service by copy admitted. Deadwood, Dakota, Dec. 27th, 1883. W. C. Kingsley, attorney for def't. Filed Dec'r 28, 1883. A. R. Z. Dawson, clerk, by O. P. Stokes, deputy.

6 In District Court, First Judicial District, of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

Now comes the defendant and denies each and every allegation in the complaint except as hereinafter otherwise stated.

Admits the defendant is and was a corporation, as stated in the complaint.

Admits failure and refusal of defendant to deliver or transfer to plaintiff any shares of the capital stock of said defendant.

Denies any knowledge or information sufficient to form a belief as to the value of the shares of said stock which the complaint alleges the defendant agreed to deliver to the plaintiff.

Wherefore defendant demands judgment that plaintiff take nothing by his suit and for costs and disbursements of this action.

W. C. KINGSLEY,
*Def't's Att'y.*

TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

Wilberforce B. Hammond, being sworn, says that he is an officer of the defendant corporation named in the foregoing answer, viz., the agent and superintendent for Dakota Territory; that he has heard said answer read and knows the contents thereof, and that the same is true of his own knowledge except as to such matters
7 stated therein on information and belief, and that as to such he believes it to be true.

WILBERFORCE B. HAMMOND.

Subscribed and sworn to before me this 18th day of Jan'y, 1884.
[SEAL.] JOHN A. GASTON,
*Notary Public.*

(Endorsed:) In dist. court. Victor Dorne *v.* Richmond S. M. Co. Answer. Due service by copy admitted. Deadwood, Dakota, Jan. 26, 1884. Eben W. Martin, attorney. Filed Jan. 2, 1884. A. R. Z. Dawson, clerk. Kingsley, for def't.

8 In the District Court, First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant.

This action came on to be heard April 10th, 1889, before Hon. Chas. M. Thomas, judge, and a jury, and thereupon the following proceedings were had: The plaintiff, to maintain the issues on his part, called as a witness VICTOR DORNE, who, being duly sworn, testified, in answer to questions by his counsel, G. C. MOODY, as follows:

Q. 1. You are the plaintiff in this case, are you not?
A. Yes, sir.
Q. 2. Where do you reside?
A. In Deadwood.
Q. 3. How long have you lived in this country—in the Black hills?
A. I came here in 1875—the fall of 1875.
Q. 4. Have you resided here ever since?
A. Yes, sir; mostly. I have been out for a few years at a time once or twice.
Q. 5. Do you know the defendant company, The Richmond Silver Mining Company?
A. Yes, sir; I am one of the incorporators.
Q. 6. Did you know the time, or about the time, when it was incorporated?
A. Yes, sir.
Q. 7. Are you acquainted with the Richmond lode and the Eureka lode and mining claims, situated in the Galena district?
A. Yes, sir.
Q. 8. You may state where they are situated with reference to other well-known objects there.
A. They are located at the eastern extremity of the town of Galena, upon the south side of Bare Butte creek, and in the immediate neighborhood of the old Davey smelter and mill.
Q. 9. Who were the original owners of those two claims?

Objected to.

Q. 10. Who were the original claimants?

Objected to as incompetent, immaterial, and irrelevant. Objection withdrawn.

A. J. W. Kyte and J. S. Pennywell.
Q. 11. Were you at any time an owner in those two claims; if so, when?
A. After purchasing their two-thirds interest.
Q. 12. At what time did you purchase the two-thirds interest?

Objected to as immaterial, irrelevant, and incompetent.
Objection sustained. Plaintiff excepts.

Q. 13. Were you the owner at any time or the claimant to any portion of the Richmond and Eureka Lode claims?

9 A. Yes, sir; I was the owner of two-thirds of the Richmond and two-thirds of the Eureka claim.

Q. 14. Did you part with any of your interest in those claims?

A. Yes, sir.

Q. 15. What interest did you part with in the first place?

A. I parted with six-sevenths.

Q. 16. Did you dispose of any portion of this two-thirds interest to this defendant company; and, if so, when?

A. Well, the company was not incorporated at the time I disposed of this property.

Q. 17. That is, you mean the six-sevenths?

A. Yes, sir; the company was not really organized at the time I disposed of it, but that was the purpose of it.

Q. 18. Now, passing beyond that, did you dispose of any of the remaining portion of one-seventh of two-thirds?

A. Yes, sir.

Q. 19. At what time or about what time?

A. On the 11th of December, 1882.

Q. 20. Do you know Mr. Scrymser, the president of the company?

A. Yes, sir.

Q. 21. Did you know him at that time?

A. Yes, sir.

Q. 22. Had you known him before?

A. Yes, sir; I had known him for years before that.

Q. 23. Where?

A. I became acquainted with him in New York.

Q. 24. Give his full name.

A. Clarence H.

Q. 25. Do you know any of the other members of that corporation?

A. Yes, sir; I know them all.

Q. 26. Just name some of them that were members at that time, in December, 1882.

A. Putnam & Earl, N. Jarvis, Junior, E. C. Fox, Mr. Hallihan—I don't remember his given name. Mr. Mordock was practically in the company.

Q. 27. Did you see Mr. Scrymser in December, 1882?

A. Yes, sir.

Q. 28. Where?

A. In Deadwood.

Q. 29. Was he then president of the company?

A. Yes, sir; he told me so.

Q. 30. Do you know how long he acted as president of the company?

A. He stated to me that he had been elected president the April before.

Q. 31. Is he still the president of the company?

A. I cannot say at present.

Q. 32. Was he when you last had any information about it?
A. Yes, sir.
Q. 33. Where was it you saw him in December, 1882?
A. I saw him upon the street in the morning.
Q. 34. In Deadwood?
A. Yes, sir.
Q. 35. Now you may state what transpired between you and him.
A. At about ten or eleven o'clock——

Objected to as incompetent.
Ruling reserved.

(Question 35 repeated to witness by stenographer.)

A. Well, I saw him about ten or eleven o'clock, and he invited me to dinner at the Merchants'. That day I was in town from Galena. We had dinner together, and after dinner I was ready to go, and he plead- that he wanted to talk with me awhile, so we went out and took our chairs by the fire, and after some considerable conversation about the prospects of the Richmond, and so on, he said to me, By the way, he says, I have never heard just what your reason was for not wishing to deed your one-seventh over to the Richmond Company. Well, says I, I am a little disappointed about the control of the company, if I understand Mr. Mordock correctly. Mr. Mordock was in the company, and I had frequently had conversations with him. He and I were quite well acquainted, and he says, Upon what grounds? And I told him how it would probably be controlled, and he said that I was entirely mistaken; that he was elected president on last April, and he proposed, inasmuch as he had spent considerable money himself in it and they expected him to spend a good deal more, that he was going to have something to say about the control and management of that company, and that he had never heard that I was to be deprived of my interest in any way, and I explained to him if I received my seventh the same as the rest of them had received theirs; if I received one-seventh of my stock and was sure of receiving it, they could have my deed; that I would under those circumstances—he explained to me—made it clear why it was the company was not going to conduct their business in a way that was distasteful to any honorable man——

Objected to.

By the COURT: Just state what you finally did about it. State the general conversation without going into personalities.

A. The result of it was that I said to him, Mr. Scrymser, if that is the situation and you are competent to control the company, I am perfectly willing to deed to you my interest, or you send me the stock and I will make the deed. As to the idea that he—that by deeding to him and he denying that he received it for the company was entirely preposterous to me, because I would have thought it was the same as though I had placed it in the Merchants' National bank or in either bank. I was satisfied that I would receive——

Objected to.

Q. 36. How much was the capital stock of that company?

A. 200,000 shares.

Q. 37. Had any of it been placed in the treasury?

A. I was not quite positive at that time or did not consider it in. What I wanted was my equal share for share that all the rest had.

Q. 38. How much did the rest get?

A. Six-sevenths. The company was organized on a certain basis, and that was the basis that I was retaining my seventh, the same as Mr. Mordock got his and every other man got his.

11 Q. 39. How much was that?

A. That was one-seventh, whatever one-seventh might be. Whether it was stocked or whether the ground remained without being stocked, I was entitled to one-seventh of that ground—one-seventh of two-thirds.

Q. 40. How much did you say the capital stock was?

A. Two hundred thousand shares.

Q. 41. And then you were entitled to one-seventh of two-thirds of the two hundred thousand; is that it?

A. That is precisely it. At the same time I was—my portion was—liable for any exigencies, treasury stock or money paid out for appropriating other stock; anything of that kind.

Q. 42. Just go on and state how many shares of stock under that agreement you were entitled to and how the rest was distributed.

A. Well, there was two hundred thousand shares originally—that was the stock. Then there was fifty thousand shares put into the treasury as treasury stock, and fifty thousand shares paid for the other third which the Richmond Company bought, either before or after the organization, I am not certain which. However, there was stock for that purpose. That left one hundred thousand shares, and the figures were made while I was present in New York.

Objected to.

Q. 43. The figures were made by whom?

A. Upon the basis of the hundred thousand shares,

Objected to.

Q. 44. Go on and state what transpired between you and Mr. Scrymser.

A. As I have said before, I believe that I explained that the situation was as he had given it to me, and, as it give me my interest the same as the other should receive theirs, they could count on my deed whenever they sent the stock here. That was about all. It was after two o'clock when I left him and I was preparing to go away, but it was not over about half an hour afterwards before Mr. Hammond came over—W. B. Hammond—just as I was ready to leave town. He called me to go to Mr. Wilson's office; that Mr. Scrymser and Wilson wanted to see me.

Q. 45. Who was Mr. Hammond? What relation did he have to the company?

A. He was superintendent of the Richmond Silver Mining Com-

pany. So I went to their office, and as I entered Mr. Wilson immediately addressed me—that Mr. Scrymser wanted to know if we could not make an immediate settlement of the transfer of my seventh to the company.

Q. 46. In what capacity were Van Cise & Wilson acting then?

A. Van Cise & Wilson had been our attorney.

Q. 47. What capacity were they then acting in reference to the Richmond Company?

A. He was acting for the president—for the Richmond Company.

Q. 48. Now, go on.

A. And I told him just what the last words were that I had exchanged with Scrymser at the hotel about an hour and a half or two before that.

Q. 49. Was Scrymser there?

A. Scrymser was present; yes, sir.

Q. 50. And within hearing?

A. Yes, sir.

Q. 51. Heard this conversation?

A. Yes, sir; heard the conversation.

12 Q. 52. Was Hammond, the superintendent, there?

A. Yes, sir; Hammond was there.

Q. 53. And Wilson, one of the attorneys?

A. Mr. Wilson was there.

Q. 54. Go on.

A. And Sevey Houghton; and I said to him that Mr. Scrymser and I had a conversation and that I had arrived at a conclusion, but the idea of giving a deed had not occurred to me at all. So that, after a little conversation, Mr. Scrymser asked me if I could not make a deed at once; that they were really in a hurry about getting a patent and placed the necessity of getting the deed upon the ground that they wanted—Mr. Scrymser used that plea; so did Mr. Wilson—that they were about to patent their ground and they required this and wanted me to act in co-operation with them, and Scrymser went over the ground and called my attention to the fact that I had said one-seventh of two-thirds was my proportion, and thinking that that was the way I understood it, and he got a pencil and figured it out on a legal-cap piece just how the figures were made; fifty thousand shares on one side and deducting—that was for treasury stock—and fifty thousand shares for the purchase of the other third in the Richmond Company, and that would leave one hundred thousand shares to be divided into seven parts. On that day Mr. Wilson figured that or said it would come to 14,285 shares. Of course, in our conversations we constantly spoke of the one-seventh of two-thirds, and he reiterated and stated that that was correct; that was entirely in accordance with my views; that I was entitled to one-seventh of two-thirds of the Richmond stock, less the treasury stock, or other stock that had been paid out *pro rata* for property purchased.

Q. 55. Was Scrymser there?

A. Scrymser was there.

Q. 56. Did he see those figures?

A. He saw those figures.

Q. 57. State what further was said and what was done.

A. And immediately after this Mr. Wilson asked me if I was ready to make my deed now; I said, Yes; if you will guarantee I will come right out of this thing without depositing my deed in escrow, I am perfectly satisfied to let it go at that; if I get my stock I am satisfied with it; you are entitled to the ground. That did not include the Eureka sale at that time; the Eureka sale I made to the company direct in June of the same year—June 16th.

Q. 58. In June, 1882?

A. 1882; yes, sir.

Q. 59. Was that for the Richmond or the Richmond and Eureka, that deed?

A. That was for the Richmond Mining Company; the Eureka claim was not in the mining company at all.

Q. 60. But I am speaking of the lode claim.

A. Yes, sir.

Q. 61. What lode claims?

A. It was adjoining the Richmond.

Q. 62. The Richmond and Eureka?

A. No; the Richmond claim was an independent claim; the Eureka claim was an independent claim; but I acquired Eureka claim before I had acquired the Richmond claim, but still it belonged to the Richmond Company.

13 Q. 63. I mean were they both included in this sale.

A. Yes, sir.

Q. 64. In December?

A. The one-seventh of the Eureka—no; the one-seventh of the Eureka was not included. Yes, it was; yes, it was. It was.

Q. 65. Had you ever got any other consideration for that transfer?

A. Not a particle.

Q. 66. Now, then, the amount fixed upon was 14,285 shares?

A. That would have been it in shares; yes, sir.

Q. 66. Now, what was done with reference to making the deed?

A. Sevey Houghton made the deed for my one-seventh of two-thirds of the Richmond mining ground—mining location.

Q. 67. Did you observe to whom that deed was made?

A. Not particularly. With our conversation in view I knew nothing else except that it was for the Richmond Company.

Q. 68. Do you know where that deed is?

A. I do not.

Q. 69. To whom was it delivered?

A. Delivered to Mr. Wilson—Van Cise & Wilson.

Q. 70. There while Mr. Scrymser was present?

A. Yes, sir.

Q. 71. The deed was made and executed right there, was it?

A. Yes, sir.

Q. 72. And left with them?

A. Yes, sir.

Q. 73. What was the date of that?

A. The 11th of December, 1882.

Q. 74. At the time of the organization of the company, in the winter of 1882, you say you had not then acquired the Eureka lode claim, or your interest in it, you think. How was that? I did not understand you.

A. No, sir; at the time the organization of the company was made the Eureka lode had not been acquired by the company. I deeded six-sevenths of it through Mr. Mordock in June of the same year after the organization. They organized in April, I think, and in June, that year, I deeded to him six-sevenths, the same as—retained my one-seventh, the same as I had in the other properties, which was entirely satisfactory to all parties.

Q. 75. When did you deed the six-sevenths of the Richmond—before that?

A. Yes, sir; I deeded that in February, I think, or March of 1882.

Q. 76. Retaining this one-seventh?

A. Retained my one-seventh.

Q. 77. In each of these lode claims?

A. Yes, sir.

Q. 78. Did you receive the 14,285 shares of that stock?

A. No, sir.

Q. 79. How much did you receive?

A. They sent me thirty-five hundred shares.

Q. 80. State whether that was or was not all the consideration which you received for making that transfer in December.

A. It was.

Q. 8I. How much is still due you?

A. Some ten thousand shares.

Q. 82. The difference between 14,285 and thirty-five hundred?

A. Yes, sir.

14 Q. 83. You say you don't know where this deed from you to the president of the company, Scrymser, is?

A. No, sir.

Q. 84. No control over it in any way?

A. No, sir; the Richmond Company have acknowledged receiving it through their president and through several of their officers.

Plaintiff offers in evidence the record of the deed above referred to, appearing on page 535 of Book 20 of the register of deeds' office of Lawrence county. Introduced without objection. (See deed next page.)

Q. 85. Is that the copy of the deed you have been testifying about?

A. Yes, sir; as near as I can——

Q. 86. Did you make any other deed to Mr. Scrymser?

A. No, sir; I did not.

Q. 87. Was that deed made right there in your presence?

A. Yes, sir.

Q. 88. Who drew it?

A. Sevey Houghton.

Q. 89. And who was present?

A. Mr. Wilson and Mr. Scrymser and myself, except for a few

minutes before it was finished I stepped out. I had a little business out and I stepped out, and I came back and signed it.

Q. 90. Any other officer of the company there?

A. No, sir; nobody else.

Q. 91. For whom was this deed made?

Objected to on the ground that the deed is the best evidence. Objection overruled. Defendant excepts.

Q. 92. I say for whom was this deed made—for what?

A. For Mr. Scrymser—for the company—for the Richmond Silver Mining Company.

Q. 93. Did you accept any pay from him personally?

Objected to as incompetent. Objection overruled. Defendant excepts.

A. Not at all. I did not look——

Q. 93. Did you ever get any consideration from him personally?

Objected to. Objection overruled. Defendant excepts.

*Mining Deed.*

This indenture, made the 11th day of December in the year of our Lord one thousand eight hundred and eighty-two, between Victor Dorne of the county of Lawrence and Territory of Dakota, party of the first part, and Clarence H. Scrymser, of the county of New York and State of New York, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has
15 granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns the following-described mining property situated in Lawrence county and Territory of Dakota to wit:

An undivided one-seventh of a two-thirds interest ($\frac{1}{7}$ of $\frac{2}{3}$) in and to the Richmond lode and to the Eureka lode both in Bear Butte mining district and being more fully described in the location certificate duly recorded in office of register of deeds at Deadwood in the county and Territory aforesaid.

Together with all the dips, spurs and a-gles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in *and* equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with

the appurtenances: To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

V. DORNE. [SEAL.]
—— ——. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN R. WILSON.

TERRITORY OF DAKOTA, }
*County of Lawrence.* }

On this 11th day of December, in the year 1882, before me personally appeared V. Dorne, known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same.

Given under my hand and notarial seal the day and year last above written.

JOHN R. WILSON,
[SEAL.] *Notary Public.*

(Continuation of testimony:)

A. I never did.

Q. 94. What was said? What were the representations with reference to whom this deed was for?

Objected to as leading and incompetent.

A. That they desired to patent——

By the COURT: State if there were any representations made as to whom this deed was for; state what was said.

16 A. The chief reason that was given why they wanted the deed right then, instead of taking up time to go to New York and sending me their stock first, was that they were very desirous of getting patent for the Richmond Silver Mining Company.

By same: Did Mr. Scrymser and these parties say this deed was for the company?

A. Yes, sir.

By same: Why did they draw it in his name? Do you remember that?

A. It was Mr. Houghton who drew the deed.

By same: Do you know why he drew it in his name?

A. I do not.

By same: They did not explain that?

A. It did not occur to me at that time.

By same: Did you read the deed?

A. I did not read the—not closely enough to recollect now whether it was Mr. Scrymser, president, or simply Mr. Scrymser; either way, the conversation that we had an hour or two before that plainly

indicated to me that he was president, and he laid a great deal of stress upon it as being president.

By same: Did he say anything to you and did you understand from his conversation that this deed was to be conveyed to him for the benefit of the company?

A. Positively.

Plaintiff offers in evidence the record of a deed from the same book, purporting to be made by Clarence H. Scrymser to the Richmond Silver Mining Company, of the same property of the same date, and recorded five minutes later than the other, found on page 536. (See deed, next page.)

Objected to and introduced subject to ruling hereafter.

Q. 95. You stated that you had received out of this 14,285 shares, which you claim is coming to you, thirty-five hundred shares; do you remember what time you received it?

A. It was several months after the time that I had deeded over to the company.

Q. 96. What was said and what was the arrangement, if any, with reference to the sending you this stock—these shares of stock—or certificates for the 14,285 — at the time of this transaction?

A. Mr. Scrymser was to see immediately upon his return that I received my equivalent—that is, payment for one-seventh of two-thirds of that property.

Q. 97. Was anything said with reference to about how long it would take?

A. Oh, he said give him time for one day in Chicago, and I think three weeks was the time that it was supposed it——

(Insertion of mining deed:)

*Mining Deed.*

This indenture, made the 11th day of December in the year of our Lord one thousand eight hundred and eighty-two, between Clarence H. Scrymser of the county of New York and State of New York, party of the first part, and the Richmond Silver Mining Company, a corporation organized under the laws of the State of New York, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the
17 United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns the following-described mining property, situated in Lawrence county and Territory of Dakota, to wit:

An undivided one-seventh of a two-thirds interest ($\frac{1}{7}$ of $\frac{2}{3}$) in and to the Richmond lode and to the Eureka lode both in Bear

Butte mining district and being more fully described in the location certificate duly of record in the office of the register of deeds at Deadwood in the county and Territory aforesaid

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in *and* equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances: To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

CLARENCE H. SCRYMSER. [SEAL.]
—— ——. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN R. WILSON.

(Endorsed.)

TERRITORY OF DAKOTA, }
*County of Lawrence.* }

On this 11th day of December, in the year 1882, before me personally appeared Clarence H. Scrymser, known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same.

Given under my hand and notarial seal the day and year last above written.

JOHN R. WILSON,
*Notary Public.*

(Continuation of testimony:)

would take. There was this further said in Mr. Wilson's office, that Mr. Scrymser, not being very familiar as to the number of shares or anything of that kind—the number of shares were only approximately. There might have been a few more shares or a few less, for some reason, for I did not pay any attention to what property they acquired or anything of that kind, but it was to be one-seventh of two-thirds of that property, whatever that was, share and share alike.

18 Q. 98. Was it figured out at that time?

A. Yes, sir; it was figured out incidentally by Mr. Wilson, who endeavored to explain to me why I could not have as many shares by getting one-seventh of two-thirds less the reservation fund than if the reservation fund was not in. He explained to me also

that I was entitled to my proportion of what was in the reservation fund the same as though I had it, and that would be used for the benefit or exploration in the mine and for other necessary expenses; but the only reservation that I recollect was that if the number of shares—if there was not near enough to the one-seventh of two-thirds after they were returned to me, I need not take them, and the deed was to be made back to me; positive understanding to that effect.

Q. 99. Explain that further.

A. Mr. Scrymser, not being very well aware of the number of shares and details about mining matters—he was entirely ignorant; did not know anything about mining matters at all; so far as business was concerned, he was a shrewd business man—as he did not understand exactly as to what number of shares, he said that if the number of shares were not satisfactory to me when they were sent to me, why, they were to—the company was to—deed back to me the original one-seventh of two-thirds.

By the COURT: You understood that one-seventh of it would be about 14,285?

A. Yes, sir.

By same: That was the general understanding, but you thought perhaps there might be some mistake as to the number?

A. I thought there might be a few less for some reason or other.

Q. 100. I hand you what purports to be a letter from Mr. Scrymser to you of date February 14th. Please examine it and state whether it refreshes your recollection with reference to the time that you received these 3,500 shares (handing witness letter).

A. Yes, sir; this is the letter accompanying the stock that I received, the 3,500 shares.

Letter referred to offered in evidence by plaintiff for the purpose of showing in what capacity Mr. Scrymser was acting, for the purpose of showing that he was acting on behalf of the company.

Objected to and received subject to ruling hereafter.

Marked Exhibit "A." (See next page.)

Q. 101. Did you reply to that letter?

A. I did.

19 EXHIBIT A.

Edw'd C. Fox & Co., bankers & brokers, 3 Wall street.

P. O. box 1336. NEW YORK, 14*th Feb'y*, 1883.

Victor Dorne, Esq., Galena, Dakota T'y.

DEAR SIR: I have been in receipt of your letter of — date for several days and ought to have replied earlier, but matters here have been somewhat unsettled and no meeting of the Richmond Co. has been held until yesterday, when the question of settlement with you was duly presented. I stated that you had deeded to me and I to the Richmond Co. your interest in the Richmond & Eureka claims, you having left the matter entirely with me to get

you in payment therefor such proportion of stock of the Richmond Company as would justly be due you, and that it had been stated to you by Mr. Wilson in presence of Mr. Hammond and myself that, as your interest was only in the Richmond & Eureka claims and the stock now covered the Fraction, Terra & Grand View property, also that your stock would be in accordance with a fair estimate on all the claims, it was determined by the trustees that the last-named property by Davy's development were shown to be worth much more than double the value of the two former claims, and hence your proportion of stock was estimated to be 3,500 shares. This stock I herewith enclose.

Yours truly, C. H. SCRYMSER.

Q. 102. Did you keep a copy of it?

A. I think not.

Q. 103. Have you read the copy which is set up in Mr. Scrymser's deposition?

A. I think I have.

Q. 104. And is it substantially a copy of what you wrote?

A. Yes, sir.

Plaintiff offers in evidence a copy of the letter above referred to, dated March 5th, 1883, dated at Galena, D. T., to C. H. Scrymser, New York, and attached to the deposition of C. H. Scrymser and marked Exhibit "3."

Objected to as incompetent, immaterial, and irrelevant; that a party cannot make declaration after a transaction has occurred in favor of himself. Objection overruled. Defendant excepts.

Letter introduced in evidence as follows:

DEF'T'S EXHIBIT No. 3. March 5th, 1885. Wm. H. Clarkson, Com'r.

GALENA, D. T., *March 5th*, 1883.

C. H. Scrymser, Esq., New York.

DEAR SIR: I am in receipt of yours of Feb. 14th, enclosing a certificate for 3,500 shrs. of Richmond stock, with a statement as to how this number of shares had been allowed me, &c. I regret to be compelled to remind you that this number does not fulfill your part of the agreement between us, made in Mr. Wilson's office. Now, Mr. Scrymser, you are not Fox; to evade an obligation of your own make & disown the truth when you meet it. You know (without giving the conversation) that in consideration of my interest you agreed to send me $\frac{1}{7}$ of $\frac{2}{3}$ of the Richmond stock, less treasury stock & stock paid out for other property, "And," said Mr. Wilson during the conversation, "you will get a statement as to the number of shares in treasury," &c. But there is no need to multiply words as to what was understood. I presented your letter & my understanding of the agreement to Mr. Wilson today and he more than coincides with me as to what was plainly understood. If Mr. Hammond paid attention I have no doubt his impression would verify my own. But surely I need not beg you to set me right in

the matter. Independent of other influences, I trust you will see that it is very unfair to hold my interest without giving me the agreed compensation or returning my interest.

Hoping to hear, I am,
Yours truly, V. DORNE.

21 Q. 105. Did you ever see any resolution which the company passed accepting this deed from you and providing for the payment of these 3,500 shares?

A. Yes, sir.

Q. 106. Whereabouts?

A. In New York.

Q. 107. Whereabouts—in the company's office?

A. Yes, sir.

Q. 108. Whereabouts did you see it in the company's office—in what place, book, or otherwise?

A. Yes, sir; a book.

Q. 109. What book?

A. Well, they termed it the minute book.

Plaintiff offers in evidence a copy of the minutes of the defendant corporation, dated New York, February 6th, 1883.

Introduced without objection and marked Exhibit "B," as follows:

"NEW YORK, *February 6th*, 1883.

The board of trustees of the Richmond Silver Mining Company met at the office of the company, number 3 Wall St., at the call of the president, due notice having been given. The following members were present: C. H. Scrymser, Henry Earle, Edw'd C. Fox, Amos J. Holahan, and John M. Mordock. Mr. Scrymser stated to the board that he had, during his recent visit to Deadwood, received a deed from Victor Dorne for his one-seventh of two-thirds ($\frac{1}{7}$ of $\frac{2}{3}$) interest in the Richmond and Eureka mining claims, the same having been transferred to him personally, he agreeing with Mr. Dorne to obtain for him, in recompense for the said interest, such proportion of one-seventh of two-thirds ($\frac{1}{7}$ of $\frac{2}{3}$) of the capital stock of the company, less the treasury stock, as would be a fair equivalent after deducting the stock paid out or set aside to secure other mining property; that he had transferred the interest so obtained to the Richmond Silver Mining Company, and asked that the amount of stock properly due for the said interest be figured up and issued in the name of the said Victor Dorne. After discussion the following resolution was adopted without dissent:

Whereas the Grand View, Silver Terra, Fraction, and Surplus claims have been recently added to the company's interest, involving large outlay of money, to be repaid in stock to the investors:

Resolved, That after fair consideration and estimate the treasurer be hereby directed to issue thirty-five hundred shares of stock, as directed by Mr. Scrymser, in payment for said above-named interest.

Adjourned.

J. M. MORDOCK, *Sec.*"

Q. 110. You say that the 3,500 shares is all that you ever received?

A. Yes, sir.

Q. 111. You were a member of the company then, from that time—from the time you received this stock—were you not?

Objected to as leading and a conclusion of law.

A. I considered myself a member from the beginning. I owned one-seventh as much as Mr. Mordock did his.

22 Q. 112. You may state what the other people—the six other interests—got each for their shares.

Objected to as incompetent, immaterial, and irrelevant. Objection overruled. Defendant excepts.

A. Under the original organization there was to be seven men, and they were to be the incorporators and to conduct the company that way, and the property was divided, all that we had acquired to be divided into sevenths, and the company afterwards bought the other third, so that it left, of course, the company owning the entire property, in which each member owned a proportionate number of shares—was all equal partners.

Q. 113. How much did the others get?

A. Several of them that I have seen, who were equal partners with myself, received the 14,285 shares—some of them.

By the COURT: Don't testify to anything except what you know; if you know it, you can state it.

A. Yes, sir, I do know it. I heard it from the parties themselves.

By same: Then that is not competent.

Q. 114. Did you examine the books of the company?

A. To a certain extent; I only had a given object to examine the books, and I discovered what I wanted to see.

Q. 115. Did you examine to see how much these people had issued to them for their share?

A. Yes, sir; they all had about that much—about that number—about 14,000 shares; some of them more; none of the incorporators, I believe, had any less.

Q. 116. Do you know what the market value of this Richmond silver mining stock was, say, at any time dating from three weeks after the 11th of December, 1882, up to this time here in Deadwood or in New York city, either, or anywhere else?

Objected to the term "anywhere else," and also because it does not fix a time for this market value.

This question withdrawn for the present.

(Court here adjourned until tomorrow, at 10 a. m.)

THURSDAY, A. M., *April 11th*, 1889.

*Victor Dorne.*

Direct examination continued by Judge MOODY:

Q. 117. I want to call your attention again to what transpired in Mr. Wilson's office and presence; you stated on yesterday, as I remember it, that yourself, Mr. Wilson, Mr. Scrymser, and Mr. Hammond was there?

A. Yes, sir.

Q. 118. And that during the course of that conversation and about at its conclusion Mr. Wilson made the figures of the amount which you would be entitled to, deducting the fifty thousand shares which Kyte and Pennywell had got and the fifty thousand shares which were retained and reserved for the treasury; where were you and Wilson and Scrymser sitting, with reference to each other, when these figures were made?

A. We were sitting nearly in front of what was then Mr. Wilson's desk, in the room adjoining—in the alley in the First National bank—and Mr. Scrymser was sitting about in the middle of the floor, next to Sevey Houghton, and Mr. Hammond was sitting—was standing at the window, looking out towards Molitors, and Mr. Wilson was sitting—went to his desk; that was not his seat, but he went there for the purpose of showing me that I would not be entitled to as many shares by receiving one-third of two—one-seventh of two-thirds as I would be if I received one-seventh of the entire capital stock, less—if I received one-seventh of two-thirds, less the treasury stock, I would be receiving as much as I would if I received one-seventh of the entire two-thirds.

23

Q. 119. Without deducting the treasury stock?

A. Exactly.

Q. 120. Where was Mr. Scrymser with reference to those figures?

A. He was sitting immediately behind where Mr. Wilson made the figures.

Q. 121. Did he see those figures?

A. Yes, sir; the window was immediately in front of him, the same as here (referring to window in court-room).

Q. 122. And you saw them?

A. I saw them distinctly. I had to make a step or two towards the desk to see them.

Q. 123. And the amount of those figures was how much?

A. Was 14,285 shares, if I recollect distinctly. It was the only time that the number of shares was spoken of. Chiefly the interest was spoken of as my one-seventh.

Q. 124. Has the company or any of its officers at any time offered you back the title to this property?

A. No, sir.

Q. 125. This transfer was made, you say, on the 11th of December, 1882?

A. Yes, sir; on that day.

Q. 126. And you received the 3,500 shares with this letter that is in evidence, dated the 14th of February, about two months after?

A. Yes, sir.

Q. 127. Have you dealt in mining stocks?

A. Oh, not very extensively; I frequently purchased stocks to hold.

Q. 128. Are you able to state what the market value of this Richmond stock was during that period, say in January and February, 1883?

Objected to.

By the COURT: Are you acquainted with the market value of this stock at that time?

A. Yes, sir; I was——

By same: Say whether you were acquainted with it or not.

A. Yes, sir; I was.

Q. 129. What was the market value of this stock of the Richmond Silver Mining Company at that time at Deadwood or any other point where it was held?

Objected to as incompetent, irrelevant, and immaterial. Objection sustained. Plaintiff excepts.

Q. 130. Do you know where the Richmond Silver Mining Company's stock was held at that time, say February, 1883?

A. Held in New York.

Q. 131. Sir?

A. Chiefly held in New York.

Q. 132. Some of it held here?

A. Yes, sir.

Q. 133. Whereabouts?

A. I knew of two men who had it, but outside of them I could not say.

Q. 134. Who were they?

A. They were Mr. Kyte and Mr. Pennywell.

Q. 135. And where were they living?

A. They were living at Galena.

Q. 136. Where was it held?

A. Where was the stock held?

24 Q. 137. Yes, sir.

A. They owned the stock. I don't know just where they had it. I presume they had it in their own hands.

Q. 138. Was there some held in Chicago?

A. Yes, sir.

Q. 139. Did you make any effort to purchase the property of Kyte and Pennywell?

A. A portion of it; yes, sir.

Q. 140. Did you offer them a price for their stock?

A. Yes, sir.

Objected to. Objection sustained. Plaintiff excepts.

Q. 141. Do you know of any being on the market here in Deadwood?

A. Very little; I think there was some.

Q. 142. What was it held at—what was the market value?

A. In Deadwood?

Q. 143. Yes, sir.

By Mr. VAN CISE: In February, 1883.

A. The market value was over a dollar.

Q. 144. How much was held there?

A. I don't think there was a great deal held in town; I could not say how much.

Q. 145. About how much?

A. I don't think there was ten thousand shares in Deadwood at that time.

Q. 146. What did Kyte and Pennywell ask you for theirs?

Objected to. Objection sustained. Plaintiff excepts.

Q. 147. Now, then, you may state what was the least price which this property could have been procured at—this stock—per share in this vicinity.

A. I was refused fifteen hundred shares at one dollar a share.

By the COURT: Do you know? Not what you were refused at.

A. One dollar a share.

By the COURT: That is the least price it could be bought at in the market?

A. Yes, sir.

Q. 148. You may state whether you made an effort to purchase the property—this stock—at that time; and, if so, what was asked you for it?

Objected to.

Q. 149. What was the lowest price at which you could get an offer?

Objected to.

By the COURT: You may state what was the lowest price which you could get it for in this market.

A. Two dollars a share.

Cross-examination.

By Mr. KINGSLEY:

Q. 1. It was on the 11th of December, 1882, that you made this deal with Scrymser in Deadwood?

A. Yes, sir.

Q. 2. Did you ever see Mr. Scrymser before?

A. I had seen him once or twice before—that is, on that trip in Deadwood.

Q. 3. You never had met him until that visit of his to Deadwood?

A. No, sir; I had seen him in New York.

Q. 4. So you were personally acquainted with him at this time?
A. Yes, sir.
Q. 5. You had known him for about how long?
A. I think it was several years, as near as I can recollect now.
25 Q. 6. Know him quite well?
A. Oh, as well as I would be acquainted with a gentleman whom I met in a distant country—frequently seen him there.
Q. 7. Had any business transactions with him?
A. None.
Q. 8. This interest, two-thirds, which you referred to yesterday, in the Richmond and Eureka, or six-sevenths of two-thirds, which had been deeded to the company, did you deed to them?
A. Yes, sir.
Q. 9. You held it at the time for Kyte and Pennywell, didn't you, and sold it to the company or made a deed to the company in their behalf?
A. In whose behalf?
Q. 10. Kyte and Pennywell.
A. No, sir.
Q. 11. Did you buy the two interests out and out and own it?
A. The sale was complete so far as I and Pennywell and Kyte were concerned.
Q. 12. Did you buy it out and out of Kyte and Pennywell or did you hold it in trust?
A. As far as Kyte and Pennywell were concerned I bought it out and out.
Q. 13. They had no interest in it then at all?
A. They retained one-third interest in the claim.
Q. 14. They had no interest, though, in the two-thirds interest?
A. Not at all.
Q. 15. Did they receive any of the purchase price for which that two-thirds was turned over to the Richmond or the Richmond people?
A. For the two-thirds they did not.
Q. 16. You disposed of six-sevenths of this two-thirds, you say, then, to the Richmond people?
A. Yes, sir.
Q. 17. Was there any consideration for that?
A. Yes, sir; whatever work had been done on the claim, whatever money had been expended on it in the meantime, between the 31st of December, when the deed was made to me, and the 15th or 16th of February.
Q. 18. Now, wasn't the consideration for that development work which the——
A. Certainly.
Q. 19. Which the Richmond folks were——
A. Certainly.
Q. 20. To do on this property?
A. Certainly.

Q. 21. There was no specified amount of development work mentioned, was there?

A. No, sir.

Q. 22. In organizing this enterprise for the opening up or the development of this mining property there, the Richmond people, so called, were interested, and an undivided two-thirds interest in the property was given to them for that purpose?

A. Yes, sir; that was the basis upon which the property was first procured.

Q. 23. Instead, however, of deeding to them the whole of the two-thirds you went to New York at that time, didn't you, when the deal was completed?

A. Yes, sir.

Q. 24. You went to New York?

A. Some time afterwards; yes, sir.

Q. 25. It was in New York that the deal was made, wasn't it, for the conveyance of these two-thirds?

A. No; the two-thirds——

Q. —. I beg your pardon, for the six-sevenths of two-thirds?

A. No, sir; the company was to have six-sevenths or seven-sevenths——

Q. 27. You do not understand my question. Your preliminary negotiations for bringing about this deal were made here, were they not, with Mr. Mordock originally?

A. With Mr. Mordock?

26 Q. 28. Yes, sir.

A. No, sir; never.

Q. 29. They were not?

A. Not.

Q. 30. Did not talk with him about it at all?

A. Oh, yes; certainly Mr. Mordock and I talked the matter over. Mr. Mordock, so far as my own disposition to buy the property and take it was concerned—Mr. Mordock was entirely in sympathy with me in that matter.

Q. 31. You and Mr. Mordock were taking hold of this or trying to take hold of this property and make a deal in New York with reference to it?

A. Yes sir.

Q. 32. For its development, among other things, weren't you?

A. Yes, sir.

Q. 33. You and Mr. Mordock had talked about it?

A. Yes, sir; frequently.

Q. 34. Here in Deadwood?

A. Yes, sir.

Q. 35. Mordock went to New York, and soon after you followed him, didn't you?

A. I do not recollect how soon it was after that. I did, though.

Q. 36. Didn't you go there in response to a word from him with reference to it?

A. No, sir; I did not; not at that particular time.

Q. 37. This two-thirds interest, then, was procured by you for the

purpose of turning it over to the Richmond folks there in New York?

A. Yes, sir.

Q. 38. You went to New York for that purpose, did you not?

A. It was one of my objects in going. My health was another object, chiefly.

Q. 39. Then you changed your mind and concluded to keep one-seventh of that two-thirds yourself and not deed it to the Richmond folks?

A. No, sir; I did not.

Q. 40. You say it was procured for the purpose of turning it over to them?

A. I did not change my mind or anything.

Q. 41. You kept one-seventh of two-thirds?

A. I did.

Q. 42. And you turned over six-sevenths of two-thirds?

A. Yes, sir.

Q. 43. Now, what compensation did you get for that six-sevenths of two-thirds?

A. I was a one-seventh owner in the entire interest of the company. That was the original plan upon which I purchased the property.

Q. 44. Do you say that for the six-sevenths of two-thirds you received from yourself, by way of compensation, one-seventh of two-thirds?

A. I say yes, sir.

Q. 45. So that, having the title yourself to an undivided two-thirds, you deeded six-sevenths of that two-thirds to the Richmond folks in New York?

A. Yes, sir.

Q. 46. And kept the other one-seventh by way of compensation for the six-sevenths?

A. No, sir.

Q. 47. Then please state what compensation did you receive for the six-sevenths of two-thirds.

A. I procured that property—two-thirds of the Richmond property—I procured two-thirds of that, transferred it to those people—to the Richmond Company—and in doing that I was to have from the beginning, before this property was touched—I was to have one-seventh interest in the company for my pay, whether it was the Richmond or anything else.

By Judge MOODY: In the company that was about to be organized?

27 A. That was to be organized, whether it was the Richmond property or any other property.

Q. 48. Was there any company organized at this time?

A. No, sir.

Q. 49. Was there any talk about organizing a company at this time?

A. Yes, sir.

Q. 50. So that your compensation then was, as you understand

it, that for procuring six-sevenths of two-thirds you were to have the remaining one-seventh?

Objected to.

Q. 51. Now, we come back to Deadwood, to that interview with Mr. Scrymser on the 11th of December. All this deal then made occurred on the 11th of December, did it not?

A. Yes, sir.

Q. 52. You had a preliminary talk with Mr. Scrymser, dined with him, and then he, with you, went over to Mr. Wilson's office?

A. No, sir; I separated from them; I separated from Mr. Scrymser, and was separate from him an hour after we had——

Q. 53. I don't care about that.

A. Yes, sir; during that afternoon I was called to Mr. Wilson's office.

Q. 54. And Mr. Scrymser in this preliminary talk made no definite arrangements with reference to this at all?

A. Yes, sir; it was made a definite arrangements, except that the making of the deed upon that day without the actual possession of the stock in my hands was not thought of or talked of at all; it was a matter that I had not looked for and did not know anything about it really, but I told him that I would do so.

Q. 55. Now, then, if you and Mr. Scrymser before dining made a definite arrangement—if you and Mr. Scrymser then made a definite arrangement on that before going to Mr. Wilson's office—won't you just briefly state what it was?

A. Well, there was a considerable preliminary talk—pleasant talk—and about New York and the Richmond mine, &c., and some little time after he said to me plainly, says he, I have never understood why you would not deed your interest to the company the same as the others did, and I objected to some of the men in the company; thought if they were going to have control of the company I did not wish to be connected with the company at all, and I was a little afraid of them. Well, he explained to me how it was that they would not have anything to say about it particularly. He said that he was president, and had been elected president about a year before, and he was out here on this trip to satisfy himself as to how the company stood and make matters plain to himself, so that he would know how to do; that he had put in a good deal of money himself, and they expected him to put in a good deal more money, and that Fox & Co. and those men were just as much trouble as I had had before, and they were eager and anxious to get them out, and that if I chose to deed my one-seventh over the same as the rest had done he would get me my stock. The number of shares were not mentioned at all that time. In fact, they never were. To state and mention the number of shares at that time when the company was not really organized was out of the question altogether, but the one-seventh of two-thirds was the
28 property I held, and that is the property. I not two hours afterwards deeded over to him one-seventh of two-thirds. It was distinctly — that I was to be a one-seventh owner with the company.

Q. 56. Mr. Scrymser said to you that if you were willing to deed over your interest in the company, the same as the rest had done, that they wanted it——

A. I would get my equivalent of stock—proportion of stock. They were preparing to have it stocked.

Q. 57. Was the word "equivalent" used?

A. No, sir; my one-seventh interest.

Q. 58. One-seventh interest in what?

A. Precisely, because I recollect in the conversation Mr. Mordock's name was mentioned.

Q. 59. I say one-seventh in what?

A. In that Richmond mine—Richmond Mining Company—in the Richmond mine.

Q. 60. What I am trying to get at, if you will be kind enough—the Richmond Company at this time was not organized?

A. No, sir.

Q. 61. Of course, then, the Richmond Company was not mentioned, was it?

A. Yes, sir; it was. The Richmond Company was organized.

Q. 62. Was the Richmond Silver Mining Company mentioned in this conversation?

A. The Richmond Company—that is the way we spoke of it.

Q. 63. Then the language used by Mr. Scrymser was the "Richmond Company"?

A. The Richmond Mining Company.

Q. 64. You knew at the time that there was no Richmond Mining Company, didn't you?

A. We all understood each other as to what Richmond Company meant.

Q. 65. I am only trying to get at the language of Mr. Scrymser, because it is material. Did he mention the Richmond Mining Company in this conversation?

A. Yes, sir; he did.

Q. 66. At the time there was no Richmond Mining Company organized?

A. Yes, sir, it was organized, come to think about it.

Q 67. Oh, it was organized?

A. Yes, sir.

Q. 68. Incorporated?

A. Yes, sir.

Q. 69. Now, then, we will proceed a little further. He stated to you that if you would deed your one-seventh of two-thirds interest in the company that you would receive—what? That is what I want to know.

A. I should receive my interest in the stock.

Q. 70. Was that his language—your interest in the stock?

A. Precisely; my seventh, my one-seventh. Nothing else was talked about.

Q. 71. Was his language that you should receive one-seventh?

A. It was.

Q. 72. One-seventh of what?

A. Of two-thirds.
Q. 73. Of what?
A. Of two-thirds.
Q. 74. Of what?
A. Two-thirds of the Richmond Mining Company stock.
Q. 75. There was no number of shares than at that time mentioned between you and Mr. Scrymser?
A. No, sir.
Q. 76. Was there anything then said by him as to the number of shares that the Richmond Company then had of stock?
A. No, sir, except that they had all received theirs, or could
29 have it at any time. They had all taken up their stock. He had his, and mentioned one or two of the others.
Q. 77. Now, was this talk then and there what you are now repeating; are you simply telling what you know or are you telling what was the talk between you?
A. I am telling the words that were spoken right then.
Q. 78. Then you and Mr. Scrymser talked about what had been done——
A. Yes, sir.
Q. 79. —by the others; and then you were to have an equal proportion of stock?
A. Yes, sir.
Q. 80. Was the number of shares which the others had received mentioned?
A. No, sir.
Q. 81. Did you have any knowledge at the time as to how much they had received?
A. I had not. I had not even figured up my own.
Q. 82. Then, at this time, when Mr. Scrymser was saying you should have your proportion of stock, you had no knowledge as how much that would be, had you?
A. Not the number of shares. I have never figured my own.
Q. 83. So that it is true, as a matter of fact, that there was no number of shares existing in your mind at this time as to how much—as to which you should receive?
A. Not the number of shares.
Q. 84. The understanding, then, which you obtained from what Mr. Scrymser said to you at that time, was that you should be treated fairly in the matter, as the others had been; was that it?
A. No reservation whatever. He told me I should have my one-seventh.
Q. 85. Did not speak of the number of shares, did not speak of the distribution of this stock among the other parties?
A. Yes, sir.
Q. 86. Didn't he intimate to you you should be treated fairly, as they had been, and wasn't that your understanding?
A. That I should be treated as the others, as our understanding prior to that time had been.
Q. 87. After this preliminary interview you and Mr. Scrymser separated for awhile, did you not?

A. Yes, sir.

Q. 88. You received an invitation from Mr. Hammond to come over to Mr. Wilson's office?

A. He came as a messenger, apparently from Mr. Wilson, from Mr. Scrymser; told me they wanted to see me.

Q. 89. Don't you call that an invitation?

A. Yes, sir.

Q. 90. You accompanied him over there, didn't you?

A. No, sir; I did not.

Q. 91. You went over?

A. I went over.

Q. 92. When you got there what time of day was it?

A. It was a little after three o'clock; about a quarter past three.

Q. 93. In the afternoon?

A. In the afternoon.

Q. 94. Whom did you find there?

A. Mr. Wilson, Mr. Scrymser, and Mr. Hammond.

Q. 95. That, with yourself, made four?

A. Yes, sir.

Q. 96. About how long in time were you there, would you say, before you finally left?

A. It was a few minutes after four when I came out.

Q. 97. Did all the parties present participate in the conversation centering around this deal?

A. No, sir.

30 Q. 98. How many of you did?

A. Mr. Hammond, or Mr. Wilson—not Mr. Hammond—and Mr. Scrymser and myself.

Q. 99. Who opened the conversation?

A. Mr. Wilson.

Q. 100. He was sitting at his desk?

A. No, sir.

Q. 101. Was he addressing you and Mr. Scrymser?

A. He was addressing me—the first address made to me.

Q. 102. In all that conversation would you say that every one present heard everything that occurred?

A. No, sir.

Q. 103. Which ones do you think did not hear what transpired?

A. Mr. Scrymser and Mr. Wilson.

By the COURT: You mean that they did?

A. They did.

Q. 104. I asked you which ones you think did not hear all that transpired.

A. I don't think Mr. Hammond heard it.

Q. 105. Now, what part of it do you think Mr. Hammond did not hear?

A. I cannot say that.

Q. 106. Have you any recollection now that any part of it was out of his hearing?

A. No, sir; there was not any part of it out of his hearing at all.

Q. 107. Have you any recollection now that any part of it was not being paid attention to by him?

A. Well, I think so. He was very indifferent, and told me so.

Q. 108. Told you so?

A. Yes, sir.

Q. 109. Mr. Wilson began the conversation, you say?

A. Yes, sir.

Q. 110. Addressing you?

A. Yes, sir.

Q. 111. What did he say?

A. The first words he said: Now, says he, Dorne, Mr. Scrymser wants to know if we cannot transfer that deed at once. He says the company is getting a patent, and they desire your co-operation—the precise words; says he, They can segregate you, you must recollect, if you refuse to come in. They can segregate you, and, of course, they cannot acquire your property, but, says he, for the sake of harmony and for the sake of having the patent gotten as early as possible, won't you make your deed now? Well, said I, Mr. Scrymser and I have had a conversation upon the subject covering the entire ground, and finding, as I do, that Mr. Scrymser's disposition is not as I had thought the entire disposition of the company was, and that he agrees to protect me, the only reason why I hesitate to give my deed is that I am not secure about my stock. If you will guarantee that I get my stock similar as though I had placed the deed in the bank, why, I am perfectly willing to make out a deed right now.

Q. 112. You were addressing Mr. Wilson at this time?

A. I was addressing Mr. Wilson.

Q. 113. And the guarantee referred to was a guarantee on the part of Mr. Wilson, for which you had asked?

A. It was not meant as upon his guarantee, but Mr. Wilson had been my attorney before that, and I looked to him, as a matter—I looked to him as though he ought to know what he was doing, as to whether I was secure in my stock. I did not rely on him. I did not hold him responsible at all.

Q. 114. Was he then your attorney?

A. Yes, sir; he was.

Q. 115. So that you were on the best of friendly and professional terms?

A. Yes, sir; and then he explained that he understood
31 Mr. Scrymser to say something or other about one-seventh of two-thirds, and he explained to me, says he, You won't get that quite. Says I, I told Mr. Scrymser one-seventh of two-thirds, less stock paid out for other property. Well, says Mr. Wilson, telling me what I did not know before, they have placed fifty thousand shares into the treasury of that stock, and, as a matter of course, you have got to bear your equivalent. Says I, Yes; I understand that, that is simply what I had recollected that Mr. Scrymser said, that whatever stock they had paid out in acquiring other property or development work that was perfectly right, and in explaining the matter to me he stepped over to his own desk right by the window near by

the alley and figured out. He placed the two hundred fifty thousand shares on one side and fifty thousand—I did not know what stock had really been paid for the other one-third, but he told me fifty thousand shares was paid for the other one-third to Kyte and Pennywell; that would leave a balance to be distributed among the seven members, one hundred thousand shares, one-seventh of which I was entitled to, and figured it out 14,285. That was all the reference by him to the number of shares. That was simply incidental on Mr. Wilson's part.

Q. 115. That was Mr. Wilson's figures. Did he do any other figuring except that?

A. No, sir; that was all.

Q. 116. Then he figured it that way, to take one hundred thousand and divide it by seven?

A. Yes, sir.

Q. 117. And stated to you that that was the number of shares to which you would be entitled?

A. No, sir; there was not anything particular said. He did not dwell upon it at all. It was simply to show me about what would be coming to me.

Q. 118. About what?

A. About what would be coming to me.

By the COURT: It was understood, I understood you to say, that you were to have one-seventh?

A. One-seventh, and that was it.

Q. 119. And Mr. Scrymser, did he see those figures?

A. Yes, sir; he did.

Q. 120. Did Mr. Scrymser take any part in the figuring?

A. Not a particle.

Q. 121. Was there anything said by Mr. Scrymser in facilitating the figuring in any way?

A. Not a word that I recollect. There was not.

Q. 122. Then the only figuring that occurred was between Mr. Wilson and yourself at that time?

A. Yes, sir; in the presence of Mr. Scrymser.

Q. 123. And do you state what Mr. Wilson acceded to the proposition at the time that you would then be entitled to some 14,285?

A. Mr. Wilson was entirely indifferent as to what there was about the fourteen hundred thousand shares, whether I got them or whether I did not get them, so far as I could understand. He did this as a matter—simply as a matter of explanation which occurred to him in his mind, I suppose, at that time.

Q. 124. Was there anything said about the company's having obtained other properties?

A. Yes, sir; there was.

Q. 125. And that, of course, it would be fair for you to stand your share of such purchase?

A. Certainly.

Q. 126. In that event, then, was it understood by you that whenever that would involve—that is, the acquisition of other
32 properties—involve any diminution of that property or stock you were to stand. Was that understood?

A. It was well understood what the properties were.

Q. 127. And it was also further understood, was it not, that whatever result the acquisition of that other property might be as to determining your proportion of the stock that you were to accede to?

A. Nothing of the kind——

Q. 128. Do you say now—go on.

A. It was well understood that the Richmond Company should secure this property, and in this property, whatever proportion it was, the Silver Terra and several other claims over there adjoining the Richmond, that they were to be bought with stock of the Richmond Company.

By Judge MOODY: Treasury stock?

A. I did not obtain that information right there, but it was a portion of the plan of the company, and that, as a matter of course, I could not be taxed any more for my share than any other seventh.

Q. 129. I only ask for what transpired on this occasion. There was something said on this occasion, was there not, about the acquisition by the company of other claims?

A. Yes, sir.

Q. 130. In addition to this Richmond mine, was there not?

A. Yes, sir.

Q. 131. Was the Grand View and Silver Terra and the Fraction mentioned?

A. The names had been mentioned—yes, sir—between Mr. Scrymser and myself. Whether it was done immediately there or up to the hotel——

Q. 132. It was either done in Mr. Wilson's office or in the preliminary conversation you had with Scrymser?

A. Yes, sir; either one place or the other.

Q. 132½. And did not Mr. Wilson at the time that he was taking part in this conversation state to you in substance that of course your proportion of the stock would depend upon the acquisition made of these other mining claims to some extent?

A. Yes, sir; to some extent.

Q. 133. Something of that kind was said?

A. That it might reduce my interest.

Q. 134. In other words, it was then stated and acceded to by you, was it not, that the acquisition of this other mining property might or might not diminish the proportion of stock which you would obtain for one-seventh of a hundred shares, wasn't it?

A. It might be a trifle less than fourteen thousand shares, because it was within two minutes afterwards that that was brought up, and I suggested to Mr. Wilson of course whatever they had paid for that property in stock would be deducted out of mine as much as anybody else, because it was in the treasury, and Mr. Wilson, when he—while he was making the figures—he explained to me why I would not get one-seventh of two-thirds of the entire capital stock, because fifty thousand shares had been put in for the sake of acquiring other property and developing the property they had, so there really was not and yet there was a little something, and if there was—there

was an "if" in it, because I did not get my stock, but the "if" had only reference to approximately; as Mr. Wilson said, That is approximately it.

Q. 135. Then there was a contingency mentioned there which might result in lessening the one-seventh of a hundred thou-
33 sand shares of stock coming to you?

A. Yes, sir; there was a slight contingency there, but anything over five hundred or a thousand shares never occurred to me or they would never have got my deed.

Q. 136. But the extent of that contingency was not mentioned?

A. No, sir.

Q. 137. At this time you were acquainted, were you not, with other members of this Richmond Mining Company besides Mr. Mordock and Mr. Scrymser?

A. Yes, sir.

Q. 138. Mention some of them.

A. I was acquainted with Mr. Jarvis, Mr. Scrymser, Mr. Fox, Mr. Hallihan.

Q. 139. You did not have a very friendly feeling toward the company at this time, did you?

A. I did, sir.

Q. 140. You did not feel like dealing with the company directly at this time, did you?

A. Yes, sir. I had authority for doing it. I was quite willing to do it; that is why I dealt with Mr. Scrymser, because he was president, and I always considered him a gentleman.

Q. 141. Do you consider him so now?

A. Yes, sir; and Mr. Mordock, of course. Mr. Mordock—I had known him for a long time in connection with others. Mr. Mordock frequently saw what I had acquired out in Galena, and he usually sanctioned it and transacted the business, but my feelings against two or three members of that company were not very friendly; neither were Mr. Mordock's at that time, for some reason.

Q. 142. Who were they?

A. They were Mr. Fox.

Q. 143. And others at this time when you were dealing with Scrymser?

A. No; I think not at that time. Of course, Mr. Fox had a little interest, and Mr. Scrymser himself in that first conversation at dinner, he told me that he was very anxious to get Fox out; he says, Maybe Mordock has not told you what trouble we have had with him. Fox and Hallihan were partners, and he says, I am anxious to get rid of them, and those were the men to whom I had objected.

Q. 144. Did you on this occasion express either to Mr. Scrymser or to Mr. Wilson or in their presence that you would not have anything to do with the company, but that you would deal, however, directly with Mr. Scrymser in the matter?

A. By that I simply meant that I would——

Q. 145. Won't you please answer the question?

(Question 144 repeated to witness by stenographer.)

A. Yes, sir; I did say that.

Q. 146. Now, go on.

A. But that I simply meant I would not act as superintendent or would not take charge of the property or have anything to do with it in that respect so long as that element remained in the company with a possibility of controlling it.

Q. 147. Didn't you use that language in connection with that deal you were then making and the disposition of this one-seventh interest?

A. Not at all.

Q. 148. Didn't you give that as the reason why you wanted to make this deed direct to Mr. Scrymser instead of having it made to the company?

A. I thought if I was making it to Mr. Scrymser, why, my interest would be protected, because he was president; had represented
34 himself so, and guaranteed as president, and as having, by reason of having put in considerable money himself, in fact more than either of the others, and was expected to put in a good deal more, I let him have it, and was overcome in my repugnance to the entire company, and I never meant that I would have nothing to do with the company by not deeding over; simply that I would not be connected with it in any official manner.

Q. 149. You did not state, then, in substance on that occasion that you would not have anything to do with the company, but that you would make the deed direct to Mr. Scrymser and deal with him personally in the matter?

A. No, sir; "personally" was never mentioned in the entire conversation at no time.

Q. 150. Did you not on that occasion make this deed directly to Mr. Scrymser with the understanding that you would rely—that you would authorize him to take that interest of yours to New York and submit the matter to the company, and that he should then and there figure with the company and ascertain what you would be fairly entitled to in the way of stock and abide by his decision?

A. No, sir.

Q. 151. Did you not on this occasion, in the presence of Mr. Wilson and Mr. Scrymser, make this deed directly to Mr. Scrymser, with the avowed declaration on your part that you would have nothing to do with the company, but would deal directly with Mr. Scrymser, whom you authorized to represent you in the matter in disposing to the company of this interest and obtaining for you what he might consider a fair equivalent?

A. Absolutely no.

Q. 152. I understand you to say that the company had never offered you this interest back.

A. No, sir.

Q. 153. Didn't you have a conversation about it with Mr. Mordock here in Deadwood after the transaction?

A. Yes, sir.

Q. 154. In that conversation didn't Mr. Mordock say to you in substance if you were dissatisfied—if there was anything you thought

was wrong—just return your stock and they would deed the interest back to you?

A. Yes, sir.

Q. 155. Now, as to the value of this stock—the stock was to be delivered to you in three months; was it within three months?

A. There was no time mentioned at all. I think there was three months mentioned there; I may have said three weeks; that is my recollection of it, but there was no time mentioned; it was simply a reasonable time—immediately after he got back. It was distinctly understood there was nothing for him to do except to get my stock, my one-seventh of two thirds of stock, and send it to me or have the deed made back to me.

Q. 156. Mr. Scrymser, then, did agree that if he did not make a satisfactory arrangement for you that he would send the—give you your title back again?

A. Yes, sir.

Q. 157. Now, this deal was made in December, 1882. What time are you fixing for the valuation of this stock which you have been naming here?

A. It was some time after; I cannot say just how long.

Q. 158. Well, about how long?

A. I cannot name any time. It was during the year.

35 Q. 159. During what year?

A. During the year 1882.

By the COURT: 1882 or 1883?

A. 1883.

By same: Didn't you say it was during the month of February?

A. I received the deed on the 31st, 1881.

By same: You mean stock?

A. I received the stock.

By same: I am not asking you when you received it; but you testified as to the value of that stock during 1883. What time during 1883 did you mean, February?

A. No, sir; it was not in February; it was some time during that month. My negotiations were to be carried on in New York. I had to sell it there.

By same: You do not understand me, I do not think. You have testified here on direct examination as to the value of the stock of that mining company during the month—or in the year 1883, and you said it was worth at least two dollars. Now, what time did you mean?

A. I meant during the year; not exactly at that time. I did not mean it immediately upon receipt of my stock. I meant that during the year 1883. It was that same year, and, I think, it was during the summer—about June, 1883—two or three months after I had it.

Q. 160. At the time when you received this stock, in February, was there any stock here on the market in Deadwood for sale?

A. I don't know.

Q. 161. Did you make any enquiries for any?

A. I did not.

Q. 162. Now, as near as you can, how soon after you received this stock in February were you advising yourself as to the market value of the stock here?

A. Within sixty days after that; probably the first of May.

Q. 163. Were you in the market trying to buy it?

A. Yes, sir; I had given orders to buy it.

Q. 164. Was there any here on the market?

A. I don't know, sir.

Q. 165. You don't know of that stock being sold here on the market during or within sixty days from the time you received this stock, do you?

A. No, sir; I do not.

Q. 166. As a matter of fact, up to, say, the first of September, 1883, do you know of a share of that stock being for sale here in Deadwood on this market?

A. No, sir.

Re-examination:

Q. 1. Where was the stock held that you tried to purchase?

A. It belonged to the two parties, Kyte and Pennywell.

Q. 2. Where held? Where did they live?

A. They lived at Galena, Dakota.

Q. 3. And it was there you made the effort?

A. Just as I have stated.

Q. 4. And made the offer?

A. And I made the offer.

Q. 5. When this property was acquired, this two-thirds of those claims, did you acquire the property yourself and take the title to it?

A. Yes, sir.

Q. 6. Pay for it?

A. There was no paying to be done; I advanced about sixteen or seventeen hundred dollars towards it before I sold, before I transferred it to the New York parties.

Q. 7. Then you advanced it in the way of development work?

A. Yes, sir.

Q. 8. Paying for development work?

A. Yes, sir; I think it was seventeen hundred dollars.

Q. 9. Now, that property was conveyed by you to certain
36 individuals?

A. Yes, sir.

Q. 10. And those individuals were to form a stock company?

A. Yes, sir.

Q. 11. An incorporation?

A. Yes, sir.

Q. 12. And how many shares were there in all to be?

A. There were to be two hundred thousand shares.

Q. 13. How many individual shares besides yours—how many were to share?

A. Seven persons.

Q. 14. Including yourself?

A. Including myself.

Q. 15. That property afterwards was turned over to the company after the formation of the company, was it?

A. Yes, sir.

Q. 16. You made a deed to the individual persons?

A. I made the deed at the request of every one present—of those who were members afterwards of the company were present—when I made my deed. I made it in the name of each one of the members except Mr. Mordock. At his request I deeded his interest to one of the other gentlemen.

Q. 17. Name those persons, please.

A. There was Mr. Jarvis, one-seventh; Mr. Scrymser, one-seventh. (Witness referring to memorandum:) Putnam & Earl, a firm of brokers, one-seventh; A. J. Hallihan, one-seventh; E. C. Fox, two-sevenths. Mr. Mordock's interest was included in that. C. H. Scrymser, one-seventh.

Q. 18. And you retained a seventh?

A. I retained my seventh.

Q. 19. This arrangement was made with the view of organizing, you say, a stock company?

A. Yes, sir.

Q. 20. And the shares of which were to be two hundred thousand?

A. Yes, sir.

Q. 21. Now, you say that during this conversation at Wilson's office and during the making of this arrangement you were to be treated as had been before talked. Were you present in New York at the time the company was organized?

A. No; not when it was organized.

Q. 22. Were you shortly before or when?

A. I was present and so were all the other members on the morning that I made my deed to the company—to the men who were to be the company.

Q. 23. When was that, as near as you remember?

A. That was in February, about the 20th, 1882.

Q. 24. Now, how soon after that was the company organized?

A. Well, I have not a distinct recollection. I think it was shortly after—a couple of months.

Q. 25. Were they then making any arrangements to organize it when you made the deed?

A. No, sir; not at that time.

Q. 26. How long did you remain in New York after that?

A. About thirty days.

Q. 27. Now, then you said "as had been before talked." What do you mean by that?

A. At which place do you mean—in Deadwood?

Q. 28. You said you were to be treated by the company as had been before talked.

A. Just before the deed was made—a few days prior—I had received partial payment on what expenditures I had made out here.

In about that time or a few days afterwards—nearly every one was present and we went over the organization of the company
37 and the character of it and the plans, and I think Mr. Mordock was instrumental in laying before the members who were to be the company, the plans and character of the by-laws, etc., and explained them in general; the most of them were not mining men, and at that time the plan was adopted as to how to pursue, who was to be in. Mr. Mordock and myself were to have an equal interest with all the rest and constituting the seven members; that was about all that was said.

Q. 29. What was that equal interest?

A. One-seventh of two-thirds.

Q. 30. Which represented what property?

A. It represented all the property the company had.

Q. 31. Now, you were asked whether during this conversation your stock was not to be dependent upon—that is, the number of shares which you were to receive—were not to be dependent upon what had been paid out for other of that property; now, at that time did you learn for the first time that treasury stock had been reserved to buy other property with, or had you known that before?

A. The first that I knew it and knew the number of shares was in Mr. Wilson's office on the day that Mr. Wilson made those figures; in fact, as I stated in my conversation an hour or two before that with Mr. Scrymser, I had never up to that time figured my interest. I was on confidential relations with the company and I knew what the contract was and the rest did, and I never figured up what shares I would have.

Q. 32. You knew there was two hundred thousand shares in all?

A. Yes, sir; I knew the number of—but I did not know how much treasury stock, if there was any—entirely ignorant on that.

Q. 33. Then, you learned for the first time on that day that there had been fifty thousand shares reserved?

A. Yes, sir.

Q. 34. Did you learn for the first time that day that the fifty thousand shares had been paid for the other one-third of that property?

A. Yes, sir; for the first time I learned it that day.

Q. 35. You knew, then, that there was fifty thousand shares of treasury stock reserved and a hundred thousand shares to be distributed among you seven people?

A. Yes, sir.

Q. 36. Was there any talk of payment for any property except by treasury stock so long as the treasury stock lasted?

A. Well, that is what I understood then—that there was no other stock to be used except what was paid out of the treasury; but my idea were, I knew about the treasury stock.

Q. 37. Now, then, you were asked if there was not a contingency that your stock was to be reduced below one-seventh of one hundred thousand shares. Was there any contingency spoken of until the treasury stock was exhausted?

A. No, sir; no impression was made on my mind, or that contingency at all, except, as Mr. Scrymser had my deed, as an absolute fact, and I hadn't my stock, a contingency was this: If my stock did not come, my deed was to come back to me. That was the chief contingency.

Q. 38. As a matter of fact, how much was paid in stock for the properties spoken of here by these people—the Silver Terra, etc.?

A. I think it was five thousand dollars, and nine thousand shares of stock paid to the——

38 Q. 39. Was treasury stock upon the market in New York during this season?

A. Not that I know of.

Q. 40. Don't know whether any of it was sold or not?

A. I do not, sir.

Recross-examination:

Q. 1. What do you know about that five thousand dollars or nine thousand shares of stock?

A. I got that from Mr. Scrymser.

Q. 2. That is all you know about that. Now, do you know that the stock of Mr. Kyte and Pennywell was a sort of preferred stock, guaranteed free from assessment and other expenses?

A. I never knew it for a fact; I had heard of it.

Q. 3. Had you heard of it at the time you went there to buy it?

A. Yes, sir; a long time before that—months.

Q. 4. The expenditure to which you have referred—I think some seventeen hundred dollars—was that on the Richmond mine?

A. Yes, sir.

Q. 5. You stated that you expended that individually.

A. I did, sir.

Q. 6. Do you state to the jury you did not—never have received it back?

A. No, sir; I do not.

Q. 7. You do not so state?

A. I do not state so.

Q. 8. Did not the accounts or bills for that go to New York, and were they not there paid?

A. I received a thousand dollars myself in New York, and Mr. Mordock came out here and paid me either seven or eight hundred, whatever it was.

Re-examination:

Q. 1. Was there any stock on the market except this Kyte and Pennywell stock nearer than Chicago during the months of January, February, and March and April, 1883?

A. No, sir; not that I know of.

Plaintiff next introduced in evidence the deposition of C. W. YALE, taken before A. P. West, police justice, in Geneva, Kane county, Illinois, on August 20th, 1885, and read therefrom as follows:

Q. 1. What is your name, age, and place of residence?

Ans. Calvin W. Yale; my age is fifty years; reside at Geneva, Kane county, Illinois.

Q. 2. Do you know the plaintiff in the above-entitled suit, Victor Dorne, and the defendant, Richmond Silver Mining Co., or either of them? If yea, when and where did you know them or either of them? Please state.

Ans. I never saw the plaintiff and have only heard of him in connection with this action. I know that there is such a company or corporation and am personally acquainted with the secretary of the same. I knew the secretary at Geneva, Kane county, Illinois, about two years and a half ago.

Q. 3. Please state, if you know, whether the said company
39 ever issued stock or was a stock company or otherwise.

Ans. I know that the company issued stock. I believe it to be a corporation doing business under the laws of the State of New York.

Q. 4. Do you or do you not know of your own knowledge that the said company isued stock? If you please, state whether you were at any time owner of any of its stock.

Ans. I know that they did issue stock. I was and am owner of some of its stock.

Q. 7. Please state whether you have negotiated or handled any stock for said company.

Ans. I have not.

Q. 8. Do you know any other matter or thing touching the matter to which you have been interrogated that may tend to the advantage of either the plaintiff or the defendant? If so, please state.

Ans. I do not.

The plaintiff next introduced in evidence the deposition of EDWARD W. ELDRIDGE, taken before Samuel W. King, notary public in Chicago, Illinois, on April 1, 1885, and read therefrom as follows:

Int. 1. What is your name, age, place of residence, and occupation?

Ans. Edward W. Eldridge; my age is forty-five years. I reside in the city of Chicago, county of Cook and State of Illinois. I am a dealer in pine land.

Int. 2. Are you acquainted with the parties to this suit, Victor Dorne, plaintiff, and The Richmond Silver Mining Company, defendant, or either of them? And, if yea, state how long you have known them respectively.

Ans. I do not know Dorne, the plaintiff. I know the defendant company. I am a stockholder in said company and have been since about December, 1882.

Plaintiff next introduced in evidence the deposition of HENRY R. SANDS, taken at the same time and place as that of Edward W. Eldridge, and read therefrom as follows:

Int. 1. What is your name and residence?

Ans. My name is Henry R. Sands. I reside in the city of Chicago, county of Cook and State of Illinois.

Int. 2. Do you know the parties to this suit, or either of them?

Ans. I do not know them. I met Mr. Dorne, but do not know the defendant company.

The plaintiff, VICTOR DORNE, was then recalled as a witness in his own behalf and testified as follows:

Examined by Mr. MOODY:

Q. 1. You were asked by Mr. Kingsley about something that Mordock said to you about returning your deed, and you answered that that was the conversation; now, what answer did you make?

A. I brought about the answer. I told him distinctly that if the company did not propose to fulfill my—the agreement under which I had let Mr. Scrymser have a deed, to return the deed to me and that I would return the stock, and I had the stock in my pocket at the time. That was the end of it. I never heard any more.

Q. 2. Now, upon the subject of the value of this stock, was there any stock in this market during the winter and spring of 1883 to the amount of ten thousand two hundred and eighty-five shares?

A. No, sir.

Q. 3. When did these people, Kyte and Pennywell, or about when, did they get their stock?

A. At the time that I approached them was about June.

Q. 4. What part of June?

A. They had spoken to me before they told me that they had—they told me that they had their stock.

Objected to.

Q. 5. Was there any other stock except what you had, that 3,500 shares, and theirs in this country at that time?

A. I do not think there was. There was none on the market; that is positive.

Q. 6. And what did they offer it to you for?

Objected to as incompetent, immaterial, irrelevant, and also for the further reason that the enquiry is not directed to the class of property in controversy in this action. Objection sustained. Plaintiff excepts.

By the COURT: He can state if he know- where there has been considerable transactions in it, what it brought in the market, but he cannot state individual instances.

Q. 7. You may state, then, what this Richmond Silver Mining Company's stock was worth at the time when it should have been under your contract delivered to you.

A. It was worth—not in Deadwood, in New York—it was worth a dollar and a half.

Q. 8. What would it cost to produce it in Deadwood?

A. Cost one dollar at my estimate.

Q. 9. What would be the expense of transferring it from New York to Deadwood? If it was worth a dollar and a half in New York what would it be worth here?

By the COURT: What was it worth in Deadwood?

A. Two dollars a share.

Q. 10. At that time?

A. Yes, sir.

Q. 11. You may state if you had any market for that stock—for this stock—at and about that time, and state all the circumstances.

A. Yes, sir; I had sold that stock at a dollar and fifty cents in New York, and had the money, seven thousand five hundred dollars, for my 3,500 shares, and fifteen hundred shares besides.

Q. 12. That was for how many shares?

A. Five thousand shares.

Q. 13. Seven thousand five hundred dollars?

A. Yes, sir.

Q. 14. And you had already been paid the money?

A. I had the money.

By Mr. VAN CISE: I would like the date of that transaction.

By the COURT: That was at the time you made the trade?

A. That was at the time I made the trade.

Q. 15. What trade do you mean?

A. Immediately afterwards, at the time the trade between I and the New York parties was made; it was within a few months after that time I received the stock from Mr. Scrymser.

41 Q. 16. This 3,500 shares you have spoken of?

A. Yes, sir.

Q. 17. Was there as many as ten thousand shares of stock except this Pennywell and Kyte stock anywhere this side of New York?

A. Certainly not in the market. I had given three or four orders in town to buy the stock and did not anybody seem able to find it.

Q. 18. Was there any considerable amount of stock held in Chicago?

A. I only know from the books; there was not a great deal held there.

Q. 19. How much?

By Mr. KINGSLEY: What books?

A. The stock book of the Richmond Siver Mining Company. There were thousands, anyway, probably ten thousand. I could not recollect the number. I had no particular interest in it at the time I examined the books.

Q. 20. Was there any there in the market over a few hundred shares?

A. There was none there that I heard of in the market at all.

Q. 21. Did you make enquiries about it?

A. Yes, sir; I did make some enquiries.

Q. 22. You say you gave orders here to buy stock?

A. Yes, sir.

Q. 23. At what price?

A. At one dollar a share at that time, when I had this deal in New York.

Q. 24. That was the spring of 1883?

A. It was some months after the time I received my 3,500 shares.

Q. 25. How many months?

A. I could not state exactly. I waited a reasonable length of time, thinking I could get the balance of my stock, and just what time I cannot recall at this time.

Q. 26. Was there any stock except this Kyte and Pennywell stock anywhere in this country?

A. Not that I could find.

Q. 27. What was the market price of that Richmond Silver Mining Company's stock, such as you held, in the city of New York during the months of February, March, April, May, and June of 1883?

A. The market price was a dollar and a half.

Cross-examination.

By Mr. KINGSLEY:

Q. 1. You received this 3,500 shares of stock about the 6th of February, 1883, did you not?

A. I think it was about the 14th.

Q. 2. At that time you had no other stock of this company?

A. Not at all—none.

Q. 3. At that time you made efforts to purchase some stock and your efforts were during that spring and summer, were they?

A. They were during about a period of a month, during which I had this deal in New York in hand.

Q. 4. These efforts were after you had received this 3,500 shares of stock?

A. Yes, sir.

Q. 5. And for about a month after that, which would *take* taken you up to about the middle of March succeeding, you made efforts to purchase some of this stock, did you?

A. No, sir; there was several months elapsed before I had this opportunity that we speak of.

42 Q. 6. Probably I can get at this thing so that we can understand you. Will you be kind enough to state to the jury when you made your first effort to purchase additional stock after you received the 3,500 shares?

A. To the best of my knowledge, about the month of June.

Q. 7. We will take that as a starter. Now, where did you make your first efforts?

A. Among the brokers here.

Q. 8. Name the brokers.

A. John Gaston, Howsley, and Cranston—three persons.

Q. 9. What Cranston was that?

A. He was here in business—engaged in speculating in stocks and buying. I do not recollect his first name—John.

Q. 10. Was he familiarly called Jack?

A. Yes, sir.

Q. 11. Was he in partnership as a broker with Mr. McDonough?

A. I do not recollect at that time. I only knew him.

Q. 12. Don't you know, as a matter of fact, that Mr. Cranston was not in the stock-broking business until for a year or so after that—until about March, 1886?

A. He represented himself so to me.

Q. 13. He did?

A. Yes, sir. In other words, he had bought stock from me before this.

Q. 14. How much of the stock did you order through them?

A. Sir?

Q. 15. How much of this stock did you order through them?

A. Just what they could buy up to fifteen hundred shares.

Q. 16. At what price?

A. At a dollar a share.

Q. 17. This was in June?

A. Yes, sir; I will set the time at that as near as I can arrive at it at this time.

Q. 18. You did not get it, did you?

A. I did not; no, sir.

Q. 19. It was not in this market at that time, was it?

A. It was not where I could get at it.

Q. 20. Now, Gaston—you also ordered some through him?

A. Yes, sir.

Q. 21. How much did you order through him?

A. Whatever he could buy up to; I gave him a good limit.

Q. 22. Mention the limit.

A. I cannot mention it. I gave him a limit so that I would not get over fifteen hundred shares.

Q. 23. Did you mention any number of shares?

A. I think I did.

Q. 24. What did you mention?

A. I cannot mention the number; what I had in view was fifteen hundred shares.

Q. 25. Did you authorize Mr. Gaston to purchase for you at least fifteen hundred shares?

A. He could purchase it, and I would be present at the time.

Q. 26. At what price?

A. One dollar.

Q. 27. Did he get it for you?

A. He did not.

Q. 28. It was not in the market, was it?

A. I don't know. I did not get it from him.

Q. 29. You also tried to procure it through Mr. Howsley?

A. Howsley.

Q. 30. Where was his office then?

A. I no not recollect, I am sure.

Q. 31. Was he a stock broker here?

A. He did deal in stocks; yes, sir.

Q. 32. Was he buying and selling stocks as a broker?

A. Well, as to what his business was aside from what he
43 agreed to do for me is what I don't know.

Q. 33. Then you don't know whether he was dealing in stocks or not?

A. I don't know.

Q. 34. Now, did you go to Cranston's office?

A. No, sir; I saw him on the street.

Q. 36. Did you go to Howsley's office?

A. No, sir.

Q. 37. How much stock did you authorize Mr. Howsley to buy?

A. I told him—I don't know as I mentioned the number of shares; but in all those to whom I—from whom I wanted to get me some.

Q. 38. That is very important.

A. But I could easily be informed at a hour's notice, and if they could get ahold of any I was to be present to take it.

Q. 39. Did you agree with these brokers that if they should bring to you or report to you that they could find fifteen hundred shares of this stock that you would give them twenty-two hundred and fifty dollars, or fifteen hundred *dollars?*

A. Whether I stated the number of shares to each one or not I do not know. I wanted the stock and it was none of their business until they got it.

Q. 40. Did you state to any of these brokers that they could procure for you fifteen hundred shares of this stock and you would take it?

A. As to the exact number of shares and explaining to each one that I wanted fifteen hundred shares, I say no; I did not.

Q. 41. Did you to any one of these three gentlemen whom you have named authorize them, any of them, either of them, to buy for you fifteen hundred shares of this stock?

A. There was no authority on them to buy it. I was to buy it; they were to look for the stock.

Q. 42. Then you did not agree with any of these gentlemen in case they found this stock to take it?

A. I did.

Q. 43. And you agreed with them if they found you not exceeding fifteen hundred shares you would take it at how much a share?

A. That was the limit—fifteen hundred shares, one dollar a share.

Q. 44. And you agreed to take that amount in case they found it, did you, at that price?

A. I did not bind myself to them that I would take fifteen hundred shares—that is, what I had sold and received the money for.

Q. 45. You did not bind yourself to those gentlemen to take any number, any definite number, of shares at that price, did you?

A. No; I did not bind myself at all. It was an order.

Q. 46. Wasn't that a sort of roving commission which you gave those gentlemen, to ascertain whether or not they could find in this country any Richmond stock?

A. Not that I know of. I have done it a dozen times since.

Q. 47. Now, you mentioned that you had had this stock and a sum in addition sold in New York; when was it you had it sold?

A. About during that same period.

Q. 48. Did you make any further attempts after these experiences with these three brokers to buy any stock in this market?

A. Yes, sir; in the meantime I was informed by Kyte or Pennywell, or both of them, that they had sold out, and would sell more stock easily at prices three or four dollars a share, I understood.

44 Q. 49. That they had sold out. Then how much stock was it you had sold in New York?

A. Five thousand shares.

Q. 50. That included that thirty-five hundred?

A. Yes, sir.

Q. 51. And it was for the purpose of filling that order you were trying to get this other fifteen hundred shares, was it?

A. Yes, sir.

Q. 52. And you had sold the stock in New York for how much?

A. For one dollar and a half a share.

Q. 53. To whom?

A. It was sold through friends of mine there; parties I did not know. I received the money in draft.

Q. 54. You have not got that draft?

A. No, sir; I have not.

Q. 55. Did you return the money?

A. When I found I could not get the other fifteen hundred shares of stock, why, the deal was off.

Q. 56. Will you give the name of the party that sent you the draft?

A. It was a draft from a broker's office or a bank. I do not recollect the party. I do not know who the individual was that sent me the draft; no, sir.

Q. 57. Will you give the name of the party who made the sale for you?

By the COURT: Your friend you speak of.

A. R. A. Marston.

Q. 58. Have you his post-office address?

A. No, sir; I have not.

Q. 59. Did you ever have it?

A. Yes, sir.

Q. 60. How long since you had it?

A. It is — New York somewhere.

Q. 61. Can you give it now?

A. I cannot.

Q. 62. Can you procure it for us?

A. Possibly I can.

Q. 63. Will you do so?

A. I will telegraph to New York, is the only way I know how to do it. If it can be got I will turn it over to you.

Q. 64. At what time was it when you received this draft?

A. It was during June.

Q. 65. After you received the draft what did you do with it?

A. I had it with me. I think I put it in Martin's or Van Cise & Wilson's safe.

Q. 66. What afterwards became of it?

A. I received it back from them at——

Q. 67. Do you say you received it back?

A. Yes, sir.

Q. 68. From Van Cise & Wilson?

A. Yes, sir.

Q. 69. Well, you are fortunate. To which one of the firm did you deliver it?

A. I do not recollect that surely.

Q. 70. Was it either Van Cise or Wilson?

A. It was one or the other; I cannot recollect.

Q. 71. In June, 1883?

A. Yes, sir; in June, 1883.

Q. 72. You received it back; which one returned it?

A. I think it was John R. Wilson who returned it to me.

Q. 73. Was there any letter with the draft stating what it was for?

A. Yes, sir.

Q. 74. Was that letter deposited with the draft with Van Cise & Wilson?

A. Yes, sir.

Q. 75. Did Van Cise & Wilson know what that draft was?

A. No, sir.

Q. 76. In what shape was it when you delivered it to them?

A. It was in a large white envelope with my name upon
45 it, and I had a letter in the envelope opened together with the draft on the inside.

Q. 77. Had you any previous correspondence with the parties through whom this sale was made by which you were to furnish them this stock?

A. Yes, sir. I knew him; I knew the party. In fact, I had received a letter making an inquiry in regard to it; said he knew I was—heard I was out here.

Q. 78. That was seven thousand dollars, did you say?

A Seventy-five hundred

Q. 79. Thirty-five hundred shares?

A. Yes, sir; five thousand shares.

Q. 80. Now, you did not get the five thousand shares?

A. No, sir.

Q. 81. Did you return that draft?

A. Yes, sir; and the stock was returned. My stock had been sent on—the 3,500.

Q. 82. Now, could you at that time have sold the 3,500 at the same price?

A. Well, that I did is all that I know.

Q. 83. But could you have sold the 3,500 at the same price?

A. No, sir.

Q. 84. The party who purchased would take either five thousand or none?

A. Five thousand shares.

Q. 85. Or none?

A. Yes, sir.

Q. 86. The name of that purchaser you are not now able to give?

A. No, sir.

Q. 87. Now, after this stock was returned to you—the 3,500 shares—did you make any subsequent efforts to sell that in New York, where the price was so high?

A. No, sir; I did not.

Q. 88. What did you do with it?

A. I retained it and sold it later on.

Q. 89. Where did you sell it?

A. It was sold here in Deadwood.

Q. 90. To whom was it sold?

A. I do not recollect the party.

Q. 91. Was it sold in a lump, all at once?

A. No, sir; it was not sold in a lump.

Q. 92. Divided up?

A. Yes, sir.

Q. 93. Did you sell it or did other parties sell it?

A. Other parties sold it.

Q. 94. How much was it sold for?

A. If I recollect, it was about seventy-five cents a share.

Q. 95. When?

A. Several years after that—several years after June, 1883.

Q. 96. How many years?

A. I don't know; I did not sell it.

Q. 97. Was it ten?

A. No, sir.

Q. 98. How many?

A. Several years; two years we will say—probably two years.

Q. 99. That would be 1885. You did not sell the stock yourself?

A. No, sir.

Q. 100. Did you get the proceeds?

A. I did.

Q. 101. Wasn't that stock divided into three parts, and two parts go to your counsel and you keep the other?

Objected to.

46 Q. 102. Did you deliver that stock—any portion of it—to other parties before it was sold, and did those other parties sell it?

A. It was my individual stock up to the time it was sold.

Q. 103. Will you answer that question as I asked it?

A. I did not carry the stock in my pocket; it was always in somebody else's possession.

Q. 104. Was the stock cut up?

A. Not that I know of.

Q. 105. Was it all in one certificate?
A. Not that I know of.
Q. 106. Was it all in one certificate?
A. I do not know, sir. I never saw it.
Q. 107. You never saw that 3,500 shares?
A. Yes, sir; I saw that 3,500 shares, but I never saw it cut up.
Q. 108. Was it all in one certificate?
A. It was when I saw it.
Q. 109. You never saw it in any other shape?
A. No sir.
Q. 110. How do you know at what price it was sold?
A. I know what I received for it.
Q. 111. What did you receive?
A. Seventy-five cents a share, possibly.
Q. 112. Did you receive seventy-five cents a share for 3,500 shares or did other parties receive part of it?
A. If they did I paid it out.
Q. 113. I will ask you another question: In June, 1883, when you had bargained this stock in New York for a dollar and a half per share and failed to deliver and receive back the 3,500 shares, why didn't you make subsequent attempts to sell that 3,500 shares in New York at that price?

Objected to as incompetent, immaterial, and calling for the expression of an opinion.
Objection overruled. Plaintiff excepts.

A. The proposition was made to me for the stock and I—after the deal was over I had no opportunity of looking around in New York for any—for selling it at all.
Q. 114. Did you make any enquiries or take any steps to ascertain whether you could dispose in New York of this 3,500 shares of stock or not?
A. I did not.
Q. 115. Was it Mr. Kyte, or with Mr. Pennywell, with whom you talked about the Richmond stock?
A. I think it was Mr. Pennywell.

(Plaintiff rests.)

47 *Defense.*

The defendant now opened its case, and to maintain the issues on its part introduced in evidence the deposition of CLARENCE H. SCRYMSER, taken before William H. Clarkson, notary public, in New York city, New York, on the 3rd day of March, 1885, and read therefrom as follows:

Q. 1. Please state your name and residence.
Ans. My name is Clarence H. Scrymser, and I reside at No. 52 East 57th street, in the city of New York. I know the plaintiff in this action, Mr. Victor Dorne. I have known him about four years last past. On the 11th day of December, 1882, I was in Deadwood,

Dakota Territory. I there met the plaintiff, Mr. Victor Dorne. I met Mr. Dorne in the office of Mr. John R. Wilson on that day in Deadwood. I had some conversation with him on that occasion. Mr. John R. Wilson was present during the whole of that conversation, and I think Mr. W. B. Hammond also. I asked Mr. Dorne if he would deed his interest in the company to the company. Mr. Dorne replied that he would not; that he would have nothing to do with the company. Mr. Dorne said that he would deed it to me with the understanding that on my return to New York I was to arrange with the company for him to receive such stock as he was entitled to, the amount of that stock to be ascertained after my arrival. I did not name any number of shares that he would be entitled to receive. I did not name any share or proportion of the capital stock. I did not at that time know the number of shares that he was entitled to.

Q. 2. Did you at that time know the portion or part of the capital stock of the Richmond Silver Mining Company that Mr. Dorne would have been entitled to?

Ans. I did not. I do not recollect that anything further was said during that conversation. Mr. Dorne then executed and delivered to me a deed. The paper-writing now shown me is the deed which I have just mentioned. Deed introduced in evidence. (See testimony of plaintiff for same deed.)

Q. 3. You have stated that you asked Mr. Dorne if he would deed his interest in the company to the company. This deed purports to convey one-seventh of two-thirds interest in the Richmond lode and the Eureka lode. How was it that Mr. Dorne did not give you a deed of his interest in the company instead of the deed now produced?

Ans. That deed conveys all the interest that Mr. Dorne had in the company.

Q. 4. In the company or in property in which the company was interested, which?

Ans. In property in which the company was interested.

Q. 5. Prior to the execution and delivery of this deed did you know what interest Mr. Dorne owned in the Richmond and Eureka lodes?

Ans. I did not.

Q. 6. In addition to what you have already stated, did Mr. Dorne at that time say what number of shares or proportionate part of the stock of the Richmond Silver Mining Company he wanted to receive as the consideration for this deed?

Ans. I think Mr. Dorne did make mention of some figures. I do not remember the amount. There was nothing said at
48 that time as to how the number of shares that Mr. Dorne was to receive for his property was to be ascertained.

Q. 7. Was anything said as to who was to fix the number; and, if so, what?

Ans. Yes; I was to discover what amount of stock was due Mr. Dorne when I reached New York and return it to him or his deed.

I was to give Mr. Dorne the stock that he was entitled to after I had discovered it, or give him back his deed.

Q. 8. Was this arrangement between Mr. Dorne and yourself a personal one, or were you acting in this matter at that time on behalf of the Richmond Silver Mining Company?

Ans. A personal one.

Q. 9. Were you sent to Deadwood at that time by the Co. or on business for it, or did you go there on your own account?

Ans. I went on my own account.

Q. 10. Had you any authority from the Richmond Silver Mining Co. at that time to purchase the interest of Mr. Victor Dorne in the Richmond and Eureka lodes at any price?

Ans. I had not.

Q. 11. At whose expense did you go to Deadwood on that occasion?

Objected to as immaterial and irrelevant. Objection sustained; to which defendant excepted.

Q. 12. What did you do next with respect to this matter of Mr. Dorne's?

Ans. I reported to the trustees of the Co.

Q. 13. How did you report, in writing or orally; to the trustees individually or as a body, at a regular meeting or otherwise?

Ans. Individually and orally at first and afterwards to the board at a meeting.

Q. 14. What action, if any, was taken by the board in respect to this matter at that time?

Ans. They figured up the proportionate amount of stock due Mr. Dorne, and after getting at the figures resolved that it be forwarded to Mr. Dorne.

Q. 15. What number of shares of stock did the Co. determine was due Mr. Dorne?

Ans. 3,500 shares.

Q. 16. What book is this now produced and shown you?

Ans. The minute book of the Richmond Silver Mining Company. On page 8 of that book is a record of a meeting of the board of trustees of that Co. held Feb. 6th, 1883. I was present at that meeting; all of it.

Q. 17. Are those minutes correctly stated in that book, or otherwise?

Ans. They are correctly stated in so far as they go. Those minutes are in the handwriting of Mr. Mordock, the secretary of the Co. I was the president of that company at that meeting.

Defendant asks to have page 8 of said minute book marked for identification by the commissioner, which is done.

Q. 18. Do you know whether the said 3,500 shares of stock were issued to said Victor Dorne by said Co.?

Ans. They were; they were sent to him by mail.

Q. 19. Did Mr. Dorne in any way acknowledge to you the receipt of those shares; and, if so, how?

Ans. He did; by letter addressed to me and I received it. The letter now produced and shown me is the letter which I received from Mr. Dorne.

49 Def't's counsel now offer said letter in evidence, and the same is hereto annexed, marked Def't's Exhibit No. 3, March 5th, 1885.

(See letter in plaintiff's testimony.)

Q. 20. Has the plaintiff ever requested you or the Richmond Silver Mining Company to reconvey to him his interest in the Richmond or Eureka lodes which was conveyed to you by the deed above mentioned?

Ans. There was a request made to me by mail once.

Q. 21. Was that request contained in the letter which has just been produced and offered in evidence?

Ans. It was.

Q. 22. Is that the only request that has ever been made by said Dorne of you or of the Richmond Silver Mining Company for a reconveyance to him of his interest in the Richmond and Eureka lodes?

Ans. The only one ever made to me. I never heard of one being made to the company.

Q. 23. Did the said Dorne ever offer to return to you or to said Richmond Silver Mining Company the 3,500 shares of stock of said Co. which he had received?

Ans. Never to me or to my knowledge to the company. I have been president of that company since the 5th of April, 1882.

Q. 24. If, during that time, the said Dorne had demanded a reconveyance of his property from said company or had offered to return his said stock to said company, would you, as president of that company, have necessarily been informed of those facts?

Ans. I should have known of it.

Q. 28. In what condition is that property today as compared with its condition when you received it from Mr. Dorne; has any ore been taken from it? The Richmond and Eureka claims I am speaking of.

Objected to. Objection sustained by the court, to which defendant excepted.

Q. 29. Has its value been diminished in any way?

Same objection. Objection sustained. Defendant excepts.

Q. 30. Is it worth as much today as it ever was?

Same objection. Objection sustained. Defendant excepts.

Q. 31. The complaint alleges that the said Co. has sold and transferred all its capital stock. What is the fact as to that?

Ans. It has not. There are still on hand between 7,000 and 8,000 shares.

Q. 33. How many shares of that stock do you own individually or as trustee?

Ans. Between 19,000 and 20,000 shares.
Q. 34. What price did you pay for so much as you purchased?
Ans. 50 cents per share.
Q. 35. Has that stock ever had any market value?
Ans. It has sold at fifty cents per share.

On cross-examination the witness testified: I am not engaged in any active business and was not in December, 1882. I was one of the original incorporators of the Richmond Silver Mining Company; that company was organized on the 5th of April, 1882.

Q. 1. Who were the original trustees of that Co.?
Ans. Edward C. Fox, Henry Earle, Nathaniel Jarvis, Jr., Amos J. Holahan, N. D. Putnam, J. M. Mordock, and Clarence H. Scrymser. Mr. Henry Earle was vice-president, Mr. Edward C. Fox
50 was treasurer, and Mr. Mordock was secretary. Those officers and trustees continued to act as such until after the contract in question was made, in December, 1882.
Q. 2. What property did the def't own at the time Mr. Dorne conveyed this property to you?
Ans. The Richmond and Eureka claims and a one-half interest in the Surplus, Fraction, Grand View, and Silver Terra claims.
Q. 3. Of whom did the company purchase this property?
Ans. The Richmond and Eureka from Kyte, Penniwell, and Oleson, the others from Dugan & Egan.
Q. 4. Was not Mr. Dorne the party who sold the Richmond and Eureka mines or his interest in them to the Co.?
Ans. Not to my knowledge.
Q. 5. Did you personally have anything to do with the purchase of the Richmond and Eureka mines owned by the company before you made the purchase from Dorne?
Ans. I did not.
Q. 6. Why do you state, then, that the property was not purchased from Mr. Dorne?
Ans. I said not to my knowledge.
Q. 7. Prior to the incorporation of this Co. did you and the others named as trustees in it own any interest in the Richmond and Eureka mines?
Ans. We did.
Q. 8. What interest did each one of you have in those mines or claims?
Ans. I could not tell the individual interests for the reason that we held a contract for purchase only.
Q. 10. Did not Mr. Dorne convey to you gentlemen $\frac{6}{7}$ths of $\frac{3}{3}$rds of the Richmond and Eureka mines or mining claims prior to the organization of your Co.?
Ans. I believe he did.
Q. 11. And he retained, did he not, his $\frac{1}{7}$th of $\frac{3}{3}$rds interest in said property?
Ans. He did.
Q. 12. What was the consideration paid Mr. Scrymser to Mr.

Dorne for the property, the $\frac{6}{7}$ths of $\frac{2}{3}$rds conveyed to you gentlemen?

Ans. I could not tell you.

Q. 13. Have you any memorandum or other means by which you can refresh your recollection?

Ans. I have not.

Q. 14. Do you mean to testify that you do not know from whom you and your associates acquired this property prior to the organization of your Co.?

Ans. I do.

Q. 15. No matter from whom you acquired it. After the organization of the company did you and your associates convey this property to the company?

Ans. We did; to the best of my recollection, immediately after the organization of the Co.

Q. 16. What consideration did you receive for such conveyance?

Ans. A certain portion of the stock of the company, about 14,000 shares each.

Q. 17. What was the entire capital stock of the Co. and its par value?

Ans. 200,000 shares, par value $5.00 each.

Q. 18. Was any stock paid or delivered to Mr. Dorne, to your knowledge, after the organization of your company for the property conveyed to you before the Co. was organized?

Ans. No.

Q. 19. When did you first visit these mines?

Ans. Dec., 1882. This was my first visit and my last one.

Q. 20. What was your object in going out there in Dec., 1882?

Ans. I thought that up to that time I had known so little
51 about the affairs of the company that I thought I would go out there to see if there was a mine there or not. That was my only object.

Q. 21. Before going there had you thought of purchasing the interest of Mr. Dorne?

Ans. I did not.

Q. 22. At that time was you personally acquainted with Mr. Dorne?

Ans. I was.

Q. 23. Where did you land or where was your objective point in going out there?

Ans. Deadwood.

Q. 24. Whom did you first see on your arrival there with reference to Mr. Dorne's transfer of his interest in the property to the Co.?

Ans. I think Mr. Hammond first suggested it to me that I secure from Mr. Dorne his interest. I had previously seen Mr. Dorne, but the subject was not mentioned. Mr. Hammond was then in Deadwood.

Q. 25. Was he acting at that time as superintendent of the mines?

Ans. He was; but I do not think the company was working at that time; but he was the sup't of the Co.

Q. 26. After Mr. Hammond suggested to you purchasing Mr. Dorne's $\frac{1}{7}$th interest, what did you next do?

Ans. Sent for Mr. Dorne, who was across the way.

Q. 27. Where were you at the time?

Ans. In the office of Van Cise & Wilson.

Q. 28. Did Mr. Dorne come over?

Ans. Mr. Dorne came over.

Q. 29. Please state all that occurred after the arrival of Mr. Dorne until the time you parted after receiving the deed.

Ans. I asked Mr. Dorne if he would deed what interest he had to the Co., and he declined to do so, refusing to have any transaction with the Co. in any way. Mr. Wilson, I believe, then said to Mr. Dorne that the Co. was trying to secure a patent for these claims, but that they could not secure it unless Mr. Dorne's interest was in and saying that it would be to his advantage to go in with the rest of us and secure the patent. Mr. Dorne still refused, but agreed to deed it to me if I should get him such stock as he was entitled to, the amount of which I did not know. Mr. Dorne then gave me a deed, which I deeded to the Co. with the understanding that when I got back to New York and could discover what was due—figure it up—I would send it to him or, failing to satisfy him, I would return him his deed. It was done then and there. He executed the deed, and I at the same time transferred it to the Co. by another deed. That was all done within 10 minutes. From the time Dorne arrived in that office until the matter was closed up I think it was about ten minutes. During that conversation Mr. Dorne mentioned an amount of stock that he thought he ought to receive. I do not remember the amount. Mr. Wilson made some figures at the time, arrived at an amount, but how it was done I could not say. I could not tell on what he based his calculations or how he arrived at his figures. I do not know how Mr. Wilson arrived at those figures. I do not think that I either assented or dissented to Mr. Wilson's figures. I had an understanding with Mr. Dorne by which I should arrange to give him what stock he was entitled to or return him his deed. I was to satisfy Mr. Dorne or return him his deed. That understanding was arranged at *at* the same time that the deed was given.

52 Q. 30. What was done with the balance of the stock belonging to the Co. after issuing the 14,000 shares to you and your 5 associates, as you have stated?

Ans. 50,000 shares were issued to Messrs. Kyte & Penniwell for their interest in the same property; 50,000 shares were paid into the treasury, called the treasury stock. Their stock was issued to Kyte & Penniwell shortly after the organization of the Co., in April, 1882, and I got mine about six months ago, and I do not know when the others got theirs. The stock was apportioned to myself and associates about the same time that Kyte & Penniwell got their stock.

Q. 31. That apportionment was made upon the basis of allowing each of you $\frac{1}{7}$th of the stock remaining after deducting the treasury stock and the 50,000 shares paid to Kyte & Penniwell?

Ans. Yes.

Q. 32. Your stock was delivered to you and the other stock to your associates in payment for your interest in the property?

Ans. Yes.

Q. 33. Are you quite clear in your recollection as to what took place in Van Cise & Wilson's office?

Ans. I am.

Q. 34. Have you any memorandum or writing of any kind?

Ans. I have not.

Q. 35. Was there anything said in that conversation in regard to the way or manner in which you was to ascertain the amount of stock which Mr. Dorne would be entitled to receive for his $\frac{1}{7}$th interest?

Ans. Not that I recollect.

Q. 36. Is it your best recollection that the amount of stock that Mr. Dorne was to receive was to be left to your own judgment after arriving back to New York?

Ans. It was to be left with me. I was to do the best I could to satisfy Mr. Dorne with stock or give him back his property.

Q. 37. Are you positive about that as to any other fact you have testified about today here?

Ans. I think so.

Q. 38. Then you mean to testify that Mr. Dorne conveyed his $\frac{1}{7}$th interest in that property to you without any understanding or agreement as to what he was to receive therefor, do you?

Ans. I do, except, as I have stated before, that I was to satisfy him with stock or return him his deed to the property.

Q. 39. Was any stock of your Co. delivered to Mr. Dorne after its organization in payment of the property transferred by him to you and your associates prior to the organization of the Co.?

Ans. No; there was not.

Q. 40. Did the trustees of your Co. for the first year, whose names you have mentioned, own all the capital stock of your Co., and in what proportion?

Ans. They did not own all the capital stock of the Co., and held in proportion each $\frac{1}{7}$th of $\frac{3}{3}$rds of the capital stock.

Q. 41. Who held the other 3rd?

Ans. I believe Kyte & Penniwell.

Q. 42. When you and your associates transferred to the Co. the property which had been conveyed to you by Mr. Dorne prior to its organization, how were you paid for it—in stock of the Co. or in cash, and how much?

Ans. We were paid for it in stock, each receiving 14,285
53 shares, being $\frac{1}{7}$th of $\frac{3}{3}$rds of the capital stock, less stock placed into the treasury of the Co., 50,000 shares.

Q. 43. At that time you had not bought the Grand View, Surplus, and Fraction and Silver Terra claims?

Ans. We had not.

Q. 44. When did the Co. purchase those claims?

Ans. Between Sept. 1st and Dec. 1st, 1882.

Q. 45. What did the Co. pay for those claims, and how was such payment made?

Ans. They were bought under an agreement, all the conditions of which I can't recollect; but they were paid for partly in stock, partly in cash, and by an agreement on our part to protect them in the courts and otherwise from encroachments on the part of adjoining owners and by development by us of their property.

Q. 46. How much cash was paid and how much stock?

Ans. 18,000 shares of stock, $9,000 in cash paid direct, and I could not state the amount of cash paid for developments or legal expenses without looking at the books.

Q. 47. Do you mean that you paid $9,000 in cash in addition to the cash paid for expenses and development?

Ans. Yes.

Q. 48. Was this stock and cash paid to the owners of whom the Co. purchased?

Ans. It was.

Q. 49. Was this stock that you have mentioned taken from the treasury stock?

Ans. It was.

Q. 50. In the names you have given of the trustees of your Co. for the 1st year are the names of N. D. Putnam and Henry Earle. Did they receive each 14,285 shares or both together receive that amount?

Ans. I think that they received that number of shares between them.

Q. 51. Was the $9,000 which you paid on that purchase paid with the proceeds of a portion of the 50,000 shares of treasury stock?

Ans. The $9,000 cash was not.

Q. 52. Was the proceeds of the sales of any of the treasury stock applied to the payment of that $9,000?

Ans. It was not.

Q. 55. You have stated that in round numbers a little over 85,000 shares of the capital stock of your Co. was apportioned among you and your associates for the property which you conveyed to the Co.; that 50,000 shares to Kyte & Penniwell and 50,000 shares — placed in the treasury. Now, what became of the balance of the stock of the Co.?

Ans. It was left in the treasury.

Q. 56. Is it there yet?

Ans. There is between 7,000 and 8,000 shares yet in the treasury.

Q. 57. Where is the rest of it?

Ans. I do not know, except the 18,000 shares and the 3,500 shares which was paid out as I have before stated.

Q. 58. When you conveyed the property to the company that you received from Mr. Dorne on Dec. 11th, 1882, as you have stated, what, if any, consideration did you receive from the Co. for such conveyance?

Ans. 3,500 shares of stock.

Q. 59. As a matter of fact, did you not convey it without any

consideration whatever at the time you made the conveyance on Dec. 11th, 1882?

Ans. I did.

Q. 60. And at that time there was no agreement between the Co. and yourself that you were ever to receive any consideration for that conveyance, was there?

Ans. There was not.

Q. 61. When was it, if ever, that the Co. gave you 3,500 shares of stock for that conveyance?

Ans. About February, 1883; about February 14th, 1883.

54 JOHN R. WILSON, sworn on part of defendant, testified as follows:

Examined by Mr. KINGSLEY:

Q. 1. What is your business?

A. I am a member of the law firm of Van Cise & Wilson.

Q. 2. What was your business in December, 1882?

A. I was practising law with the same firm.

Q. 3. Are you acquainted with the plaintiff?

A. I am.

Q. 4. Are you acquainted with the defendant company?

A. I am.

Q. 5. Were you present in Deadwood on the 11th of December, in your office, at the time that Mr. Dorne and Mordock and Mr. Hammond were there—Mr. Scrymser and Mr. Dorne were there?

A. I was present at that time. I think it was the 11th of December. It was along in December. I have no positive recollection as to the date exactly.

Q. 6. You have heard the testimony of Mr. Dorne in this case, have you?

A. I have.

Q. 7. You were present at the time referred to by him in his testimony?

A. Yes, sir.

Q. 8. Do you know what arrangement, if any, was then made by this plaintiff with Mr. Scrymser with reference to the conveyance then made by him to Mr. Scrymser of one-seventh of two-thirds of the Richmond and Eureka claims?

A. I do.

Q. 9. As briefly as you can, please state to the jury what that arrangement was.

A. They had some talk together, and Mr. Dorne expressed some feeling regarding Mr. Fox and perhaps another member of the board of directors of the Richmond Company and said he would have nothing to do with them—would make no deal or conveyance to them. After some further talk, which we all took part in, they finally agreed.

By Mr. MOODY: State what was said. Don't state any conclusion of yours.

A. I do not remember what was said. I can tell you generally what they agreed to do. I cannot remember——

By the COURT: Give the substance of what they said.

A. Mr. Dorne said—made these remarks about these directors, and that he was willing to trust Mr. Scrymser in this matter, and said that he was willing to deed this property to Mr. Scrymser and to trust to him to protect his interest in the matter and to do what was right and fair. I said to Mr. Dorne, You know Mr. Scrymser; you know he is responsible, and Mr. Scrymser will agree, if the company won't do what he thinks is right and fair, that he will have them convey this property back to you. Mr. Dorne refused to convey the property to the company. It was talked of, and I explained to him why we wanted the title. We were getting ready to apply for a patent, and we wanted the entire title in the mine in the company. Mr. Dorne said he would deed to Mr. Scrymser and Mr. Scrymser could deed to the company. They agreed upon it after talking over these points, and it was also talked over with reference to the stock, and I remember it was said—I said to Mr. Dorne it would be easy enough to determine what stock you were entitled to if there was no other property involved. I says, since the company has organized on this Richmond and Eureka property—I do not know that anything was said about the Eureka. It was generally talked of as the Richmond mine. They have acquired several other properties. I said, They have bought the—naming them—the Silver Terra, the Grand View, and another property. I remem-
55 ber taking a piece of paper—Now, I says, if there was no other property involved, why it would be plain enough to reach. I says, Fifty thousand shares—the company was organized with two hundred thousand shares—they have put fifty thousand into the treasury. There is one hundred and fifty thousand shares, of which they have given since the time you made this arrangement—they have given fifty thousand to Kyte and Pennywell, and, I says, if there was no other property but the Richmond or the Richmond and Eureka involved, the statement would be just like this: You would take a hundred thousand shares—I sat right down and took a piece of paper—you would divide it by seven, and each of you would be entitled to one-seventh of one hundred thousand shares of stock. Mr. Scrymser spoke of their having spent money, the sum I don't remember, but it seems to me something like ten thousand dollars, as I remember, in expenses during that year, which these promotors or incorporators had advanced. He said he had advanced a good deal of money; that they would consider the amount of money expended, the various property put into it, and then make an equitable adjustment of it. Mr. Scrymser said he had no feeling in this matter, nothing but the friendliest feeling towards Mr. Dorne, and would see that his rights were protected, and it was at that time, I think, that I said in case they would not do what Mr. Scrymser thought was fair that Mr. Scrymser would be responsible to Mr. Dorne for the reconveyance of this property. Two deeds were then prepared, and who prepared them I do not remember, whether I did or whether Mr. Houghton, who was in our office

at that time, but two deeds were drawn, and one of them was executed by Mr. Dorne, conveying this one-seventh of two-thirds interest in the Richmond and Eureka to Mr. Scrymser, and one conveying the same property from Mr. Scrymser to the Richmond Silver Mining Company. Mr. Dorne signed one and Mr. Scrymser signed the other. I took both of the acknowledgements at the same time and filed them both—took them both or sent them both to the recorder's office at the same time.

Q. 10. Did Mr. Dorne see the deed which was then made, as you have stated, by Mr. Scrymser to the company?

A. He did, sir.

Q. 11. Do you recollect now what was said by Mr. Scrymser, if anything, with reference to the delivery by Dorne of this deed to him after you had stated what you have said with reference to figuring as to the amount of stock that he should receive?

A. I cannot say what he said directly after the time of that figuring. I remember generally what he said during this talk, and if he could not get a satisfactory settlement of this matter, that he thought was fair and just, he would be responsible for the reconveyance of this property to Mr. Dorne if Mr. Dorne would consent that he could then deed it to the company.

Q. 12. Before the deed then was executed by Mr. Dorne to Mr. Scrymser Mr. Dorne had assented to the proposition which you have stated Mr. Scrymser made, had he?

A. He had agreed to deed it to Mr. Scrymser.

Q. 13. Was anything said by Mr. Dorne upon that occasion
56 as to the number of shares to which he was entitled?

A. Yes, sir.

Q. 14. What did Mr. Dorne say?

A. Mr. Dorne said that he was entitled to this one-seventh of two-thirds of one hundred thousand shares, less what would be equitable apportioned or paid out for these other properties, to allow the expenses incurred in the development, purchase, or defense of the other property.

Q. 15. Was there any amount mentioned as to what these expenses were?

A. No, sir. I remember Mr. Scrymser stated there about his having advanced ten thousand dollars or having spent some ten thousand dollars, but did not know what the expenses were and could not tell until he got back to New York. That was why he did not make—he said he did not make the calculation at that time. He did not know what they had paid or expended.

Q. 16. When Mr. Dorne stated that he was entitled to this one-seventh of a hundred thousand shares what reply, if any, did Mr. Scrymser make to that?

A. I never heard Mr. Dorne say that. He said he was entitled to one-seventh, less these deductions. Mr. Scrymser agreed——

Q. 17. That is what I mean.

A. Mr. Scrymser agreed and they both agreed upon that.

Q. 18. And after that Mr. Dorne made this deed to Mr. Scrymster?

A. Yes, sir.

Q. 19. Is that all that transpired there pertaining to the matter, that you recollect?

A. It was not all of it. I cannot give that. That is six or eight years ago. I cannot give all the talk that occurred. That was all that was done.

Q. 20. On that occasion did you figure out in the presence of Mr. Dorne and state to him that he was entitled or would be entitled to one-seventh of one hundred thousand shares of stock?

A. I said to Mr. Dorne that if there was no other property to be considered—if it was just the organization of this company upon the Richmond and Eureka property—I says it would be very easy to determine. I sat there and figured out just what it would reach—just fourteen thousand—some fraction about it. I don't remember the exact figures. I says, That would end it; but, I says, this company now have three or four other properties and you would be entitled to a *pro rata* share when these other properties are taken in and the expenses that they have incurred.

Q. 21. After you made that statement to Mr. Dorne what reply did he make?

A. I understood—I am satisfied Mr. Dorne concurred with that idea. I do not remember the words he said, but that is what they agreed to.

Q. 22. Was there any figuring done there by Mr. Dorne in your presence?

A. There may have been; I do not remember.

Q. 23. Was there any by Mr. Scrymser?

A. There may have been; I do not remember it.

Q. 24. How long were they there?

A. My recollection would be that they were there talking; I cannot remember. It seems to me it was about—it was about two o'clock when they came into the office; I cannot remember. It seems to me they were there altogether an hour. It only took us a very few minutes to complete it after they agreed. There
57 was a good deal of preliminary talk and general talk.

Q. 25. Has this matter been discussed between you and Mr. Dorne since that occasion?

A. Yes, sir.

Q. 27. Where?

A. I do not remember. I presume in my office.

Q. 28. Who was present?

A. I do not remember. Mr. Dorne and I once discussed it between ourselves; another time Mr. Mordock and Mr. Dorne and I had an interview about it.

Q. 29. The discussion, then, between yourself and Mr. Dorne with reference to it—state, if you please, briefly what occurred then.

A. I cannot remember what was said. I remember that we talked it over, and Mr. Dorne was complaining and said to me, What was the understanding? I said, Mr. Dorne, as I remember, they were to figure this up, and you were to have your one-seventh of two-thirds of this stock, less what would be equitable deduction

for these other properties and for the money they had expended, and Dorne said that is what they agreed to do. I said to him at that time that I will guarantee to you that Mr. Scrymser will convey your property back to you if they don't do what he thinks is right. I do not remember the time, but I think it was the next spring that this conversation occurred, and likely when he got this letter about the stock. I cannot fix the time. I do not remember even the year; but I do know it was some months after that.

Q. 30. Then the interview which you have referred to subsequently to that, when Mr. Mordock was present, yourself, and Mr. Dorne, was that in your office?

A. They were in the office, it seems to me; I am quite sure it was in the office.

Q. 31. Won't you be kind enough to state what occurred then in the presence of Mr. Dorne with reference to this transaction?

A. Mr. Mordock was asking Mr. Dorne—I should judge from what was said that they had been talking about that before. He says, Wilson, we want to know what this difference is with Dorne, and says, We want to get at what the arrangement was, and wanted me to state it to them both, and I stated as near as I could, as near as I have here——

Q. 32. Was the statement that you then made the same statement you made here today?

A. In effect, yes, sir.

Q. 33. Go on.

A. And Mr. Dorne did not dispute it; did not object to it; but they were talking about some differences between Mr. Dorne and Mr. Scrymser, and went off together. I took very little part in their conversation, otherwise then stating what I understood to be the arrangement between Mr. Dorne and Mr. Scrymser.

Q. 34. Then on that occasion, as well as on the other, after you had stated your understanding to Mr. Dorne, as you were requested to do, Mr. Dorne did not dissent from your understanding?

A. My recollection is that he agreed with me.

Q. 35. Have you any knowledge about the reception by you or your firm of the draft referred to by Mr. Dorne today?

A. No, sir.

Q. 36. Did you ever hear of it before?

A. Never.

Q. 37. Have you any recollection of his having deposited with you about that time any important papers to be kept in your safe?

58 A. I do not remember of his ever having a paper in our safe other than some papers in some—may have been in some lawsuit or something of that kind. I do not remember of ever having a lawsuit for him individually. It may have been that we had at one time, but never any deposit of any papers of any kind, I am quite sure.

Q. 38. You have no knowledge, then, of ever having received from him any papers for deposit in your office, in the safe or other-

wise, unless it be some papers pertaining to legal proceedings. Is that correct?

A. Yes, sir; and those were not kept in the safe.

Q. 39. Do you know Jack Cranston, referred to by Mr. Dorne?

A. Yes, sir.

Q. 40. Do you know whether or not he was engaged as a broker here in 1883 or not?

Objected to as immaterial.

Q. 41. Was Jack Cranston living here in Deadwood in 1883?

A. I could not say.

Q. 42. Do you know whether Mr. Howsley was or not in 1883?

A. I could not say. I am quite positive that he was not. I cannot fix the date he came here, but I do not think he resided here in 1883.

Q. 44. What is your recollection with reference to Mr. Cranston?

A. Mr. Cranston had lived here before and after. He was for some time a resident of Lead City; I cannot say when or at what time.

Cross-examination.

By Mr. MOODY:

Q. 1. The object of getting Mr. Dorne into your office that day was to get a transfer of this property to the Richmond Silver Mining Company, was it not, so that you might get a patent?

A. Yes, sir.

Q. 2. And that was the whole object and purpose of the deal between him and Scrymser?

A. That was all, sir.

Q. 3. And Scrymser right at the time and in his presence, and almost the same instant, executed a deed from himself to the Richmond Silver Mining Company?

A. Yes, sir.

Q. 4. Now, you regarded Mr. Dorne's statement as some sort of a sentiment he had against some member of the company, didn't you?

A. No; I thought that he would not trust the company and was willing to trust Mr. Scrymser. That is what he said.

Q. 5. Did Mr. Dorne accept anything from Scrymser for this property? Was there a word said with reference to Scrymser's paying him anything for the property?

A. Yes, sir.

Q. 6. Wa'n't the pay to come from the company through Scrymser?

A. Yes, sir.

Q. 7. Then Scrymser wa'n't to pay it?

A. You asked me for my opinion, what I regarded, and I was trying to give it to you.

Q. 8. Scrymser wa'n't to pay, was he, except as agent of the company?

By the COURT: Was it understood at the time the money and stock he got he was to get from the company through Mr. Scrymser?

A. Yes, sir.

59 Q. 9. You figured this up and figured what was coming to him at 14,285 shares and a fraction?

A. If the Richmond Company—the Richmond and Eureka were the only mines owned by the company, that is what he would receive.

Q. 10. My dear sir, did one-seventh of the treasury stock belong to him, too?

A. That was spoken of, that he would still own his interest in the treasury stock the same as any other stockholder.

Q. 11. He would have his proportionate share in it?

A. Yes, sir.

Q. 12. One-seventh?

A. Yes, sir; one-seventh of two-thirds.

Q. 13. Wouldn't he have one-seventh of the treasury stock after having paid——

A. The treasury stock? What his stock that he received bore to that proportion he would own that proportion.

Q. 14. If this other property was paid out of the treasury stock he would be interested in it, wouldn't he?

Objected to.

Q. 15. Whatever other property may have been paid out of the treasury stock, was there any arrangement there by which he was to pay any out of his stock?

A. No, sir.

Q. 15½. Whatever treasury stock was used to pay for the property did not deplete his share at all, did it?

A. I do not know what you mean. You mean was anything said at the time about this?

Q. 16. Yes, sir.

A. No; there was nothing said except, as I remember, in talking that he—he says when they were trying to get him to deed this property and take his proportionate share of stock that he was to have an interest in all these other mines, in the Golden, Grand View, and Silver Terra, and own his interest—his proportionate interest—in the treasury stock, and in making the deductions they figured what expense they had incurred, what arrangements they had made——

Q. 17. What! Did they figure there; was there any figuring done there about it?

A. No, sir.

Q. 18. What are you talking about, then? I am asking you what occurred there.

A. If your honor please, I want to answer Judge Moody respectfully and that is all I want.

Q. 19. Of course, I am going to treat you with proper courtesy.

A. I say Mr. Scrymser said they would figure that over when he

got back to New York; that he did not have the amount and they would make an estimate what would be fair——

Q. 20. Are you still a lawyer for that company?

A. I am, sir.

Q. 21. The Richmond Silver Mining Company?

A. Yes, sir.

Q. 22. What I want to get at is this: Do you undertake to say to this court and jury that out of his share of the hundred thousand shares there was to come any stock when the property that was bought was paid for by the treasury stock?

A. I do not know what the stock was. The other mines were paid for.

Q. 23. Was there any understanding——

A. There was no talk of that kind, no mention made of that, of what it was bought with.

Q. 24. When the property was paid for by the treasury
60 stock was it not the understanding that he had just as much interest in that as these other parties?

A. Nothing was said about what other properties were paid for—what they were paid for with; whether it was cash or stock, and I did not know, and did not know until I heard this deposition during this suit.

Q. 25. There were never any figures made there at that time which depleted his share of the hundred thousand shares?

A. There was not. The only figures that were made were made upon the basis of the Richmond and Eureka mine; and, as I said, it would be very easy to determine your amount if there was no other property involved; it would be one-seventh of a hundred thousand.

Q. 26. If other property was bought but had been paid for by the treasury stock wouldn't he have paid his proportion?

A. Do you want my opinion?

Q. 27. Yes, sir.

Objected to.

By the COURT: You mean to say, by this agreement it was not understood anywhere by him if it was paid for by the treasury stock that he was to be diminished.

A. There was nothing said about having any—anything paid for by the treasury stock.

By same: What was your understanding at the time; that it was paid for outside of——

A. Do you want my understanding?

By same: What you gathered from the conversation.

A. I gathered this: that Mr. Dorne refused to have any dealing with the Richmond Company; he was willing——

Q. 28. You have stated that three or four times.

A. And he was willing to deed this to Mr. Scrymser; and, Mr. Scrymser, he says, I will trust you in this matter and I will leave you to decide, to agree what and—adjust—what is an equitable amount of stock for me to receive, taking into consideration the

other properties that they have bought and the expenditures they have made and the expenses they have incurred.

Q. 29. Do you mean the properties that were bought by the Richmond Company?

A. The Grand View, the Silver Terra——

Q. 30. They were bought by the Richmond Company, wa'n't they?

A. I think so.

Q. 31. Do you know what was paid for them?

A. I do not.

Q. 32. Don't you know they were paid for in treasury stock?

A. I do not.

Q. 33. Don't you know that Mr. Scrymser swears that eighteen thousand shares of that treasury stock was paid for this property?

A. Yes, sir; and, as I said awhile ago, I never knew it before this suit came up. I never saw this deposition until this week.

Q. 34. Don't you know Mr. Scrymser swears nine thousand cash was paid on that property; don't you know he swears that all the treasury stock has been spent and all of Mr. Dorne's stock except about eight or nine thousand? In other words, it is all gone but about eight or nine thousand shares.

A. I heard it read the same as you did.

Q. 35. Don't you know he swears he paid fifty cents a share for his stock?

61 By the COURT: Never mind that.

Q. 36. Was there any understanding on that occasion that Dorne should bear any different share of the expense of procuring these properties or the expense attending the development of the mine than either one of these other people?

A. Nothing of that kind said.

Q. 37. Whatever was expended, he was to bear his proportion to the others, was he not?

A. I have explained it to you as well as I can.

Q. 38. Didn't you so understand it? In other words——

By the COURT: Was he to come in on an equal footing with the others and pay his part?

A. I say this: I don't know; I don't know who paid for these properties.

By same: Never mind about who paid for them; I want to know what was the understanding between them; was he to come in on an equal footing with all of them and pay his proportion to make him equal?

A. I understand this: That Mr. Scrymser said he had paid out large sums of money and these others, and that these properties they had bought—I thought at that time they had bought these properties for cash, and that Mr. Dorne would come in on the basis of these different properties that they had bought in to make him, as they considered, on an equitable basis, and Dorne was to come in on an equitable basis.

Q. 39. Didn't you know the fact that Mr. Dorne was one of the original company—that is, one of the originators of this corporation?

A. One of the original owners—yes, sir—of the property.

Q. 40. And wasn't that one-seventh of the property or two-thirds of it?

A. Yes, sir.

Q. 41. Didn't you know the fact that this delay had occurred of his making the deed and taking the stock—a delay had occurred?

A. Yes, sir.

Q. 42. Until the following December?

A. Yes, sir.

Q. 43. Didn't you know the company was organized in April previous?

A. I knew it was organized in the spring; yes, sir.

Q. 44. Now, then, was there any understanding by which Mr. Dorne was not to have his equal share of the benefits of that property?

A. Well, it was the understanding as I gave it to you.

Q. 45. That he was to have an equal benefit with the others in this property?

A. I gave it to you as I understood it; you can make out of it as you like.

Q. 46. Was he to pay anybody a premium to get into this company?

A. Nothing was said about that.

Q. 47. Did you contemplate at that time or ever that he was to get but thirty-five hundred shares of that stock when the rest got 14,285?

A. I did not, sir; there was nothing said of the amount of stock other than one-seventh of one hundred thousand shares.

Re-examination:

Q. 1. Did you contemplate any definite number of shares that Mr. Dorne was to receive on this property?

A. I did not; for Mr. Scrymser said he could not tell until he got back to New York and figure up the amount.

62 Recross-examination:

Q. 1. Don't you know he has failed to figure it up to this day?

Objected to.

(Court here adjourned until tomorrow at 10 a. m.)

FRIDAY, A. M., *April 12th*, 1889.

Defendant now moves to strike out all the evidence of Victor Dorne, the plaintiff in this action, relating to the alleged negotiation or attempted negotiation for the sale of five thousand shares of the stock of the Richmond Mining Company with a party in New York, and also the alleged efforts to buy stock in this market with orders at a dollar a share for the purpose of meeting such alleged sale or negotiation for sale.

Motion denied. Defendant excepts.

EDWIN VAN CISE sworn on part of defendant.

Examined by Mr. KINGSLEY:

Q. 1. Are you a member of the firm of Van Cise & Wilson here in Deadwood?

A. I am.

Q. 2. Were you such during the years 1882 and 1883?

A. I was.

Q. 3. From that time up——

A. Yes, sir.

Q. 5. Did you hear the testimony of Mr. Dorne on yesterday with reference to depositing with your firm a package containing a draft for seventy-five hundred dollars?

A. I did.

Q. 6. State whether any such deposit was ever made with your firm or not.

Objected to.

Question withdrawn.

Q. 7. State whether Mr. Dorne has ever deposited with your firm any paper, envelope in—any paper in or out of an envelope for safe-keeping in your safe or otherwise.

Objected to as immaterial. Objection overruled. Plaintiff excepts.

A. Never with me that I can recollect of; and I feel quite positive I should recollect it if he had, because the only dealing I ever had with Mr. Dorne personally——

By the COURT: Not to your knowledge?

A. I want to give my reasons for the fact——

By Mr. MOODY: I object to it.

A. I think I have a right to give my reasons.

By the COURT: Go ahead.

A. Well, the reason that I think I would have remembered such a transaction if it had occurred is because I can only recollect one transaction that I ever had with Mr. Dorne, and that was a suit to foreclose a miners' lien that he consulted me about, brought by Mabbs Brothers, the only time I ever transacted any business with Mr. Dorne.

63 By the COURT: You mean to say to the court and jury so far as your recollection goes he never deposited, to your knowledge, any such papers?

A. Yes, sir.

Cross-examination.

By Mr. MARTIN:

Q. 1. Up until about the 27th of November, 1882, I was associated with Mr. Wilson and yourself in that office, was I not?

A. Yes, sir; I believe that is a fact.

Q. 2. Isn't it a fact before that time—before November 27, 1882—we had frequent transactions for Mr. Dorne in that office?

A. Not that I can recollect.

Q. 3. Do you remember the case of Victor Dorne against Elias Aduddel?

A. You had control of that entirely.

Q. 4. In your office, was it?

A. Yes, sir.

Q. 5. The firm at that time was Van Cise, Wilson & Martin?

A. Yes, sir.

Q. 6. The firm of Van Cise, Wilson & Martin handled the business?

A. Yes, sir; but you in person controlled that.

Q. 7. Don't you know, in connection with that case, Mr. Dorne had papers in that safe?

A. Not to my knowledge or recollection.

Q. 8. Don't you know that, in connection with this business, that Dorne brought in papers that were put in the safe?

A. If they were deposited there they were not handled to me or came under my supervision to my knowledge now.

JOHN R. WILSON recalled.

Examined by Mr. KINGSLEY:

Q. 1. Had you any authority of any kind at the time of that transaction in your office which you related yesterday, in December, 1882, from the defendant in this case to close any transaction for them with the plaintiff?

A. I had none.

Cross-examination.

By Mr. MOODY:

Q. 1. Hadn't you been instructed to obtain this outstanding interest so that the claim might be patented by the company?

A. I had not.

Q. 2. Wa'n't you making that effort?

A. When? That day?

Q. 3. Yes; and prior thereto.

A. I don't remember of ever doing anything more than getting the title from Kyte and Pennywell some months before and perhaps about the time the company was organized.

Q. 4. On that day wasn't you trying to get the title for the company?

A. Yes, sir—that is, I wanted the deed to go to the—I wanted Mr. Dorne—I think I asked Mr. Dorne if he would not deed this to the company.

Q. 5. Did you have no authority to do that?

A. None whatever.

Q. 6. Was you acting without authority wholly?

A. We were attorneys for the company.

64 Q. 7. And was you acting wholly without authority?

A. We were attorneys for the company and desired to make application for patent.

Q. 8. You were authorized to make an application for patent to obtain title from the Government to the whole of this property for the company?

A. We were authorized to make application for patent is my recollection now.

Q. 9. Weren't you authorized to get title for the company?

A. I do not remember of any such instructions before Mr. Scrymser came.

Q. 10. After Mr. Scrymser——.

A. I do not recollect. We suggested to Mr. Scrymser the propriety of getting Mr. Dorne to deed to the company and I may have asked Mr. Dorne to do so.

Q. 11. And he concurred in it?

A. Mr. Scrymser?

Q. 12. Yes, sir.

A. I think so. I am satisfied he did.

Q. 13. Didn't Mr. Hammond also concur in it?

A. I don't remember, but possibly he did.

Q. 14. Who signed the application for patent?

A. I do not remember.

Q. 15. Did you?

A. I do not remember; I cannot say.

Re-examination:

Q. 1. At this time had you any authority from the Richmond Mining Company to make this application for patent?

A. I cannot say, Judge Kingsley, when it was. The application had not been made, and I do not remember when it was suggested or when it was made, but it was after that time, I know.

Q. 2. You were taking steps at the time to obtain patent for them, weren't you?

A. No, sir; we had not commenced it, because they did not have full title.

By the COURT: You were getting ready to do it. Didn't you testify to the fact you told him you desired this deed for the purpose of getting patent?

A. Yes, sir, and we did not take any steps until we got this title. I asked Mr. Dorne to deed to the company so that we could do it for the company and he refused to do it.

JOHN M. MORDOCK sworn on part of defendant.

Examined by Mr. KINGSLEY:

Q. 1. Where do you reside?

A. In Geneva, Illinois.

Q. 2. Are you acquainted with the parties to this suit?

A. I am.

Q. 3. In December, 1882, and the succeeding spring of 1883 did you sustain any official relations towards this defendant?

A. I did; yes, sir.

Q. 4. What?

A. I was practically the managing trustee of the Richmond Mining Company at that time. I was one of the trustees. I was its secretary, and the general management of its affairs devolved on me.

Q. 4. Where did that company have its office?

A. At number 3 Wall street, in the city of New York.

Q. 5. Were you present at a meeting of the trustees of the company in New York had on the 6th of February, 1883?

A. I was present at that time; I believe that is the date.

Q. 6. Look at the paper I hand you and see if that is the date (handing witness paper).

65 A. February 6th, 1883; that is the meeting at which that resolution was passed. I was present.

Q. 7. Was Mr. Scrymser there?

A. He was.

Q. 8. Did he make any statement at that meeting as to any negotiations or dealings he had with Dorne while here in Deadwood?

Objected to by plaintiff as incompetent, immaterial, leading, suggestive, and hearsay, no testimony appearing anywhere which authorized the party spoken of, Scrymser, to make any such declarations; that the plaintiff was not present, and the defendant corporation has not produced its own minutes of the proceedings of that board at that meeting and reciting what was reported to the board by the party Scrymser.

Objection overruled. Plaintiff excepts.

A. He did.

Q. 9. State what those representations were, and we here agree with the court if he states anything in conflict with this resolution it may be stricken out. You are familiar with this resolution, aren't you?

A. I am.

Q. 10. State what those representations were, but state nothing in conflict with this resolution.

Objected to as incompetent, immaterial, and hearsay.

A. Your honor, I don't want to be in conflict with that resolution; I am willing to state anything that occurred there, no matter what it is.

Q. 11. State what those representations were, then.

Objected to as incompetent, immaterial, calling for hearsay testimony, being declarations of the president of the corporation in the absence of the plaintiff, and because the proceedings of the board relating to this subject should be and purport to be contained in the records of the company which are in evidence in this case.

Objection overruled. Plaintiff excepts.

A. Mr. Scrymser stated to the meeting and at the beginning that during his visit to Deadwood he had a transaction with Mr. Dorne here individually and on his own account and authority which he very much regretted. Then he stated what the transaction was about as he has stated in his deposition. Now, I can tell you what the trustees said if you want me to.

Plaintiff moves to strike out the foregoing answer because it is strictly hearsay, undertaking to give in evidence what Mr. Scrymser declared he had done prior to that.

Motion denied. Plaintiff excepts.

66 Continuation of answer: There was some discussion about the situation then the company was in.

By the COURT: You need not state about what condition the company was in.

Q. 12. What was said at that time?

A. He said he had—his transaction with Mr. Dorne was this: that Mr.——

This question and answer objected to for reasons heretofore stated. Objection overruled. Plaintiff excepts.

A. He said Mr. Wilson said to him——

Objected to.

By the COURT: Not what Mr. Wilson said; the transaction with Mr. Dorne.

A. He said he asked Mr. Dorne if he would not—said to Mr. Dorne they wanted to get—he wanted to apply for a patent for the Richmond claim, and asked Mr. Dorne if he would not join him, as Mr. Dorne owned an interest in it, in making the application for patent; that Mr. Dorne said to him, No; he would not do it. He asked him if he hadn't better then take some stock in the company for that little interest in the Richmond and let the Richmond go ahead and make application for the patent and pay all the expenses, attorneys' fees, etc.

Plaintiff moves to strike out the last answer of this witness. Motion granted. Defendant excepts.

Q. 13. State what representations Mr. Scrymser made at that time with reference to the negotiations he was making for Mr. Dorne concerning the disposition to the company of this one-seventh of two-thirds of the Richmond and Eureka mines.

A. He said he——

Objected to as incompetent, immaterial, and also that the question calls for declarations of Mr. Scrymser and is hearsay; it calls for the declarations of a party as to his authority to act for another. Objection overruled. Plaintiff excepts.

By the COURT: Just state what he did in regard to negotiating and closing this matter with the company; not testify to anything

that he said or Mr. Dorne said or Mr. Dorne authorized him to say, but what he did.

A. He said he had received a deed from Mr. Dorne to himself, individually and personally; that he, as an individual, had transferred that to the Richmond Company. Now, I don't want to get into any muss; I am willing to state anything. Do you want to know what the trustees said to him then?

Q. 14. What proposition he made, upon what terms he proposed——

A. He said—I can tell you what he said he had said to Mr. Dorne, but you don't allow that.

By the COURT: What did he say to the company; what did he want the company to do in order to take the property?

Q. 15. Did he make any proposition to them to do anything with Mr. Dorne or transfer any stock?

67 A. He asked the company to give Mr. Dorne such amount of stock as would be a fair equivalent for that one-seventh of two-thirds interest in the Richmond claim.

Q. 16. Had Mr. Scrymser any authority to negotiate on behalf of the company for this interest with Mr. Dorne, so far as you know?

Objected to as immaterial, irrelevant, and incompetent, as calling for the witness' opinion of a question of law based upon facts which are or are not disclosed by the record, and also calling for his opinion of such records as are in existence.

Objection overruled. Plaintiff excepts.

A. He had no authority whatever.

Plaintiff moves to strike out the answer as not responsive to the question, and as incompetent.

Motion denied. Plaintiff excepts.

Q. 17. Were you present in the city of Deadwood, in the office of Messrs. Van Cise & Wilson, after these negotiations referred to were made, when Mr. Dorne was also present?

A. I was.

Q. 18. When was that?

A. Some time after these negotiations, but I do not remember the exact time; I think shortly after.

Q. 19. Can you give the month or year?

A. I cannot.

Q. 20. Was it before or after this suit was brought?

A. Before this suit a long time.

Q. 21. State what occurred at that time in the presence of Mr. Dorne with reference to any conversation about this transaction.

Objected to unless it is in the presence and hearing of Mr. Dorne.

A. Just what occurred in Mr. Wilson's office?

Q. 22. Yes, sir.

By the COURT: In the presence of Dorne?

A. In the presence of Mr. Dorne.

By same: In a conversation in which Mr. Dorne engaged?

A. Yes, sir. Mr. Dorne went and I went to Mr. Wilson's office, going at my request, he saying the transaction had occurred in the presence of —— ——. I said, Mr. Wilson, there seems to be some difficulty between Mr. Dorne and Mr. Scrymser over a transaction they had in which Mr. Dorne deeded an interest in the Richmond claim to Mr. Scrymser. I wish you would state to us, Mr. Wilson, just about what that agreement was between the two, as we desire to avoid any difficulty whatever with Mr. Dorne, and I would like to reach a conclusion in the matter if I can; Mr. Wilson then stated the case, and I don't remember just exactly what he said; Mr. Dorne sat without any dissent or assent whatever to what Mr. Wilson stated.

By the COURT: He stated what he stated here yesterday, did he?

A. He stated about what he stated; I do not remember what it was. When he finished his statement he said, Mr. Dorne, you will remember that Mr. Scrymser said and you said that if he did
68 not secure an amount of stock that was satisfactory to you that he would be responsible for the transfer back to you of that interest. After that conversation I said to Mr. Dorne, Now, Mr. Dorne, our only desire is to avoid any difficulty; we have had no transaction with you whatever; your transaction was with Mr. Scrymser. If you will simply send back that 3,500 shares of stock to the Richmond Company the Richmond Company will deed back that interest to Mr. Scrymser and you, and Mr. Scrymser can settle for the transaction for yourselves; we certainly want no difficulty with you, and we do not want to involve Mr. Scrymser in any difficulty with you. That was the whole substance—sum and substance—of the transaction.

Q. 23. What reply, if any, did Mr. Dorne make to that proposition?

A. He made no reply of any consequence; he said nothing; he neither assented or dissented. He would not say to me he would send the stock back, and he would not say that he would not.

Q. 24. Did he advise you at that time that he had the stock; did you have any knowledge at that time as to whether he had the stock?

A. I did not.

Q. 25. Is the defendant still willing to comply with that proposition?

Objected to. Objection sustained. Defendant excepts.

Q. 26. Have you any knowledge upon the subject as to the rights of Mr. Dorne with reference to any of the capital stock of this company originally independently of the negotiations referred to by Mr. Scrymser?

By the COURT: Have you any knowledge?

A. I have.

Q. 27. Do you know in what capacity, if any, otherwise than owner, Mr. Dorne held the undivided two-thirds of that property?

Objected to as immaterial, irrelevant, and incompetent. Objection sustained. Def't excepts.

Q. 28. In December, 1882, February, 1883, or between those periods or along about that time, were you in the city of New York?

A. I think so; yes, sir. I think I was the most of the time. I lived there about that time.

Q. 29. Are you acquainted with the market value during that time of this stock there?

A. It had no market value there.

Q. 30. Why do you say that?

A. Simply because there was no stock on the market and because it was simply a piece of development work in which the ownership was represented in stock, the stockholders not desiring to sell any stock to anybody or put it on the market.

By the COURT: You say you are acquainted with the market value there and there was no such stock on the market.

A. There was no such stock on the market—no stock offered.

By same: That is what you mean to say?

A. Yes, sir; it was development——

By same: Do you know the value of the stock; what was the value of the stock there?

A. It had no value. We hoped to make it valuable by our development; that was actually the fact.

69 By same: You don't mean to say it was actually valueless?

A. I mean to say that we hoped to make it valuable.

By same: I mean didn't it have some value. Wasn't it worth something upon the market? Wouldn't it have brought something upon the market?

A. I think if we had gone out and offered people that stock probably about two or three or four cents a share on chance. I don't know that it had any value at all. I don't think it had, probably.

Plaintiff now moves to strike out the answer of Mr. Mordock in which he said Mr. Scrymser had no authority whatever to negotiate or purchase this property, upon the ground that the proper foundation for such answer was not laid, and upon the further ground that the answer must necessarily involve a legal conclusion, and the further ground that the answer necessarily is secondary evidence.

Motion denied. Plaintiff excepts.

(Cross-examination waived.)

70 NEIL MCDONOUGH sworn on part of defendant.

Examined by Mr. VAN CISE:

Q. 1. Where do you reside?

A. In Deadwood.

Q. 2. How long have you resided here?

A. Going on six years.

Q. 3. Since the first of the year 1883?

A. 1883; yes, sir; the first of June.

Q. 4. Were you acquainted with John A. Cranston?
A. Yes, sir; John Cranston.
Q. 5. Did you know him in 1883?
A. Yes, sir; I believe I did. I was not acquainted with him. I knew him by reputation, was all.
Q. 6. Do you know where he resided or was in business at that time?
A. I think he resided in Deadwood, but I think at that time he was working for the Homestake Company *in* the office. That is my recollection.
Q. 7. Was he subsequently a partner of your—in the stock business?
A. Yes, sir.
Q. 8. When was that?
A. That was in—we came together in that business in February.
Q. 9. Do you know of his being in business of any kind here in Deadwood in 1883?
A. No, sir.
Q. 10. Were you acquainted with Mr. Howsley?
A. Yes, sir; I am acquainted now with him.
Q. 11. Do you know when he first came to Deadwood?
A. I think it was in 1885. I do not recollect of him before that.

Cross-examination.

By Mr. MOODY:

Q. 1. Now, when did you come here?
A. About the first of January, 1883.
Q. 2. What were you engaged in?
A. I was probate judge then.
Q. 3. Where were you residing?
A. After I came to Deadwood?
Q. 4. Yes, sir. Whereabouts was your office?
A. In the court-house.
Q. 5. Were you attending strictly to it?
A. Yes, sir.
Q. 6. Confined there all the time, pretty much?
A. Yes, sir.
Q. 7. Wasn't Mr. Howsley here for months at the time as early as 1882?
A. I don't know. I do not recollect him before 1885.
Q. 8. You don't know but he was here before that time?
A. No, sir; he might have been here all the time.
Q. 9. You knew Jack Cranston had been here for several years?
A. Yes, sir.
Q. 10. And was engaged in business here in the office of Corson & Thomas, didn't you?
A. No; I don't recollect him. I don't recollect that.
Q. 11. You don't know the fact that for years he was with that firm?

A. I don't know. I did not know him at that time any more than by hearing his name mentioned; knew him by reputation.

(Defendant rests.)
(Testimony closed.)

The defendant now moves that the court, upon all the evidence in this case, direct a verdict for the defendant; which motion was annul-ed and denied by the court; to which ruling the defendant duly excepted.

71 The court then gave, at the request of the defendant, the following—

*Instructions to the Jury.*

1.

In this case the jury are instructed that at the time of the execution of the deed by the plaintiff Dorne to C. H. Scrymser and by Scrymser to the defendant company, on or about the 11th of December, 1882, said C. H. Scrymser had no authority to act as an agent for the defendant company in purchasing from the plaintiff the property described in those deeds, and the defendant is not bound by any agreement made by him with the plaintiff at that time in regard to any consideration to be paid for said property unless at the time referred to the said Scrymser was assuming to act as the agent of the defendant in said transaction with the plaintiff and thereafter the defendant ratified the agreement so made by said Scrymser with full knowledge of all the material facts constituting such agreement, and unless you find from the evidence that Scrymser was then assuming to act as such agent of the defendant and that the defendant did so ratify such agreement the plaintiff cannot recover in this action, and your verdict will be for the defendant.

2.

In this case the jury are instructed that in order to make the defendant liable for any contract entered into by C. H. Scrymser with the plaintiff for the exchange of any amount of stock in the defendant company for an interest in the Richmond and Eureka lodes you must be satisfied from the evidence that the defendant has ratified such contract with a full knowledge of all material facts connected therewith, and that ignorance, mistake, misapprehension, or suppression of any of the essential circumstances relating to such contract will discharge the defendant from any liability by reason of any supposed adoption of or assent to such contract made by Scrymser.

3.

In this case the jury are instructed that if you find from the evidence that on the 11th of December, 1882, Clarence H. Scrymser, in negotiating for and purchasing of the plaintiff the property de-

scribed in the complaint in this action, was acting in an individual capacity and on his own personal account, then the question of ratification by the defendant need not be considered by you, but your verdict will be for the defendant.

4.

For the purpose of ascertaining with whom the plaintiff's contract was made in this case the jury may consider the testimony of the witnesses to the transaction on December 11, 1882, the act of the plaintiff in making a deed to Scrymser instead of to the defendant, the plaintiff's correspondence afterwards, and all the facts and circumstances in evidence in this case. If you believe from the evidence that plaintiff's contract was with Scrymser personally and not with the defendant, then plaintiff cannot recover in this action, and your verdict must be for the defendant.

5.

The jury are instructed that if you believe from the evidence that in the agreement made by the plaintiff with C. H.
72 Scrymser on the 11th day of December, 1882, said C. H. Scrymser was made or constituted agent of the plaintiff to procure for plaintiff from the defendant company any amount of stock in the defendant company in exchange for the interest in the Richmond and Eureka lodes then conveyed by plaintiff to said Scrymser, then if the amount of stock thereafter procured by said Scrymser for the plaintiff in pursuance of such agreement was not satisfactory to the plaintiff his right of action, if any arise, would be against Scrymser and not against the defendant, and your verdict will be for the defendant.

6.

In this case the jury are instructed that the burden of proof upon all the issues is upon the plaintiff, and unless you believe that he has established his right to recover by a fair preponderance of the evidence upon these issues your verdict must be for the defendant.

The defendant also requested the court to give the following instructions, but it declined and refused so to do, and marked upon the margin of each the word "refused;" to which ruling of the court the defendant duly excepted:

7.

In this case the jury are instructed that if you believe from the evidence that the plaintiff is entitled to recover, then the measure of his damage will be the value of the stock in the defendant company which he should have received over and above the thirty-five hundred shares received by him. Such value is deemed to be the price at which plaintiff might have bought such stock in the market nearest to Deadwood at such time after he should have received such stock as would suffice, with reasonable diligence, for him to

purchase the same, together with interest thereon at 7 % per annum; and you are further instructed that there is no competent evidence as to the plaintiff's damages before you in this action unless it be the evidence of Mr. Mordock.

(To the refusal of the court to give which instruction the defendant at the time duly excepted.)

8.

If the jury believe from the evidence that at the time of executing the deed of December 11, 1882, the plaintiff refused to deed to the defendant company and would only deal with C. H. Scrymser, looking to him to secure his stock in exchange for his deed, then the plaintiff's contract was with said Scrymser, and it matters not what the defendant company did thereafter with said Scrymser in the premises, but your verdict would be for the defendant.

(To the refusal of the court to give which instruction the defendant at the time duly excepted.)

9.

In this case the jury are instructed that whatever agreement was made between the plaintiff and C. H. Scrymser on the 11th of December, 1882, regarding the exchange of stock for the interests in mining property that day conveyed by plaintiff it was subject to an option or privilege on plaintiff's part to demand and receive a reconveyance of the interests so conveyed if the amount of stock sent in exchange for said interests should not be satisfactory to plaintiff; and you cannot find that the defendant ever ratified the agreement between Scrymser and the plaintiff unless you find from the
73 evidence that the provision in regard to said option or privilege given to the plaintiff as aforesaid was communicated to the defendant and was understood by it to be a part of the agreement at the time of any supposed ratification by it, and unless you so find your verdict will be for the defendant.

(To the refusal of the court to give which instruction the defendant at the time duly excepted.)

10.

If the jury find from the evidence that the plaintiff authorized Mr. Scrymser to dispose of his one-seventh of two-thirds of the Richmond and Eureka mining claims to the defendant in New York for such amount of the capital stock of the defendant as should be satisfactory to the plaintiff or reconvey to the plaintiff such interest in said mining claims, then the plaintiff had an option to accept the stock which Scrymser should so procure from the defendant or demand and receive back such conveyance; and in this case, if the plaintiff was not satisfied with the thirty-five hundred shares of stock of the defendant company which he received, it became and was his duty before bringing this action to return or offer to return the same to the company, with a demand for the reconveyance of his said interest in said mining claims to him, and unless the jury

find from the evidence that he did so return said stock or offer to return the same to the company and demand a reconveyance to him he cannot recover in this action, and your verdict will be for the defendant.

(To the refusal of the court to give which instruction the defendant at the time duly excepted.)

The court then gave the following instructions at the request of the plaintiff:

If the jury shall find that on or about the 11th day of December, 1882, the plaintiff, Victor Dorne, sold and conveyed to one Clarence H. Scrymser, the president of the defendant corporation, an undivided one-seventh of two-thirds interest in the "Richmond" and "Eureka" lodes or mining claims described in the complaint for the purpose and with the expectation that the said property should be by the said Scrymser conveyed to the defendant, The Richmond Silver Mining Company, and for the purpose of disposing of the said properties to the said company, and if the jury shall further find that the said Scrymser had no authority to purchase or accept conveyance of the said property for and on behalf of the said defendant company, nevertheless, if the jury shall further find that the said property was thereafter by the said Scrymser transferred and conveyed to the defendant, The Richmond Silver Mining Company, without the payment of any new or different consideration by the said company, and that the said company, with full knowledge of the facts, ratified the said action of the said Scrymser and accepted the said transfer and conveyance of the said property, with knowledge of the terms and conditions which the said company was to reimburse the said Dorne for the said property, then the said defendant, The Richmond Silver Mining Company, would be responsible for the purchase of the said property from the said Dorne by the said Scrymser in its behalf and is in law bound by the terms of the said purchase by the said Scrymser as fully and completly as though the said Scrymser had been
74 authorized to negotiate the said purchase from the said Dorne for the said company in the first instance, and if the jury shall further find that it was agreed between the said Dorne and the said Scrymser, on or about the 11th day of December, 1882, at the time of the conveyance of the said property from the said Dorne to the said Scrymser and by him to the said defendant company, that the said Dorne should be paid as consideration for the said conveyance of the said property one-seventh of one hundred thousand shares of the capital stock of the said company, or fourteen thousand two hundred and eighty-five and five-sevenths shares thereof, and if the jury shall further find that the defendant has delivered to the plaintiff three thousand five hundred shares of the said capital stock and no more, then the plaintiff is entitled to recover from the defendant in this action the value of the difference between three thousand five hundred shares of the said stock and fourteen thousand two hundred and eighty-five and five-seventh-shares thereof or ten thousand seven hundred and eighty-five and

five-sevenths shares of the said stock, the said value to be estimated and determined as of such time after the said property was agreed to be delivered to the said plaintiff as would suffice, with reasonable diligence, for the plaintiff to make a purchase of an equivalent of such stock in the market nearest to the place where you find the plaintiff ought to have been put in possession thereof, and at the price at which such stock might have been bought in said market, and interest at 7 % per annum upon the value of the said ten thousand seven hundred and eighty-five and five-sevenths shares from the said time, and your verdict should be for the plaintiff accordingly.

(To the giving of which instruction the defendant at the time duly excepted.)

V.

If the jury believe from the evidence that C. H. Scrymser, the president of the defendant corporation, undertook to contract with the plaintiff for the sale and transfer of the mining property described in the plaintiff's complaint through him to the defendant corporation for the consideration of one-seventh of one hundred thousand shares of the capital stock of said corporation, and at the time said Scrymser was not authorized to make such agreement, and the company thereafter, with full knowledge of the facts, ratified such agreement and received the title to the said property and has paid thereon a part of the consideration, to wit, three thousand five hundred shares of the capital stock of the said company, and has paid no more than that, then the plaintiff is entitled to recover from the defendant such unpaid consideration the same as though said Scrymser was authorized to make such agreement in advance, and your verdict should be for the plaintiff accordingly.

(To the giving of which instruction the defendant at the time duly excepted.)

VI.

If the jury shall find from the evidence in this case that the plaintiff, Victor Dorne, conveyed the property described in the complaint, to wit, the one-seventh of an undivided two-thirds of the Eureka and Richmond mining claims, to C. H. Scrymser, the then president of the defendant corporation, with the understanding and agreement between them that the said Scrymser should
75 convey and transfer the said property to the defendant corporation; and if the jury further find that the said Scrymser then and there agreed to procure from the said defendant corporation, as a consideration for the transfer and conveyance of said property to him, the said Scrymser, and from said Scrymser to the defendant, a number of shares of the capital stock of the defendant corporation equivalent and equal to one-seventh of two-thirds of the capital stock of said corporation after deducting from such capital stock fifty thousand shares thereof, called "treasury stock," and also after deducting therefrom whatever of such remaining shares as had been theretofore *been* used, transferred, or pledged for other property; and if the jury further find that the two-thirds of said capital

stock after deducting the 50,000 shares of treasury stock amounted to one hundred thousand shares; and if the jury further find that no portion of the said two-thirds of the capital stock thus remaining had been paid for other property, but that all such as was paid had been paid out of the treasury stock; and if the jury further find from the evidence that the said Scrymser communicated this agreement to the board of directors of the said corporation and conveyed to said corporation said property and the said board ratified said agreement and accepted the title to said property with full knowledge of the consideration which was to be paid by the said company therefore, then the said plaintiff is entitled to recover from the said defendant the value of the number of shares to which he would be entitled under said agreement less what he has received, to wit, he would be entitled to the value of 10,785 and five-sevenths shares, which value is to be estimated as follows: You are to take the price at which the plaintiff might have bought an equivalent number of like shares in the market nearest to the place where such shares ought to have been delivered to the plaintiff and at such time after a failure to so deliver according to such agreement as would suffice, with reasonable diligence, for the plaintiff to make a purchase of such number and like shares of said company, together with interest thereon from such time at the rate of seven per cent. per annum.

(To the giving of which instruction the defendant at the time duly excepted.)

VII.

If the jury find for the plaintiff in this action, in estimating the damages to which he will be entitled the jury will take the price, as you find such price from the evidence in this case, at which the plaintiff might have bought an equivalent number of like shares to the possession of which you find he was entitled and of which he has been deprived in the market nearest to the place where, by the agreement between the parties, if you find such agreement, he ought to have been put in possession and at such time after the breach of duty by defendant as would have sufficed, with reasonable diligence, for the plaintiff to make such a purchase, together with interest on the amount thereof at the rate of 7% per annum from such time.

(To the giving of which instruction the defendant at the time duly excepted.)

The jury are instructed that the question as to whether or not the Richmond Silver Mining Company has offered to the
76 plaintiff, Victor Dorne, a reconveyance of the property described in the plaintiff's complaint is not involved in this case, the defendant tendering no issue of that kind and making no claim to that effect in its pleading.

(To the giving of which instruction the defendant at the time duly excepted.)

The court then gave the following charge to the jury on its own motion:

GENTLEMEN OF THE JURY: The instructions given you at the instance of counsel for plaintiff and defendant are sufficient, in the mind of the court, to cover pretty fully the grounds in this case, but the court has charged you in one of these instructions that there is no evidence in this case tending to show that C. H. Scrymser, the president of the defendant company, had any authority to make this deal or transfer of property with the plaintiff, Victor Dorne. I still repeat that instruction; but if you believe from the evidence that said Scrymser assumed to act in behalf of said company and did act at the time said transfer was made to him by the plaintiff, and the company afterwards, with full knowledge of the facts, ratified the transaction, then I say the company is as much bound to the plaintiff in the contr-ct as if it had been made directly with it; but if you believe, I say, from the evidence in this case that the transaction was not made on behalf of Scrymser with the plaintiff in behalf or for the use and benefit of the company, but was an individual transaction between Scrymser and Victor Dorne, then no subsequent ratification by the company can avail the plaintiff in this case.

You can retire, gentlemen, with this in addition, that you are the sole and exclusive judges of the testimony and the weight thereof in this case.

(The defendant excepts to this charge so far as it states the law on the subject of ratification, beginning with the words "but if you believe" and concluding with the words "directly with it.")

Thereupon the jury retired and, after deliberation, returned into court a verdict for plaintiff.

Thereafter, in due time, the defendant served upon plaintiff its notice of intention to move for a new trial, as follows, to wit:

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Plaintiff,
*vs.*
THE RICHMOND SILVER MINING COMPANY, Defendant.

Please take notice that the undersigned, attorneys for the defendant, intend to move the court to vacate and set aside the verdict returned by the jury on the 13th day of April, 1889, and the
77 judgement rendered by the court thereon, and to grant a new trial of this action, for the following causes:

I.

Irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial.

II.

Accident and surprise which ordinary prudence could not have guarded against.

III.

Newly discovered evidence material to the defendant which it could not with reasonable diligence have discovered and produced at the trial.

IV.

Excessive damages appearing to have been given under the influence of passion or prejudice.

V.

Insufficiency of the evidence to justify the verdict in this—

1. The allegations of the cause of action to which the proof was directed were unproved not in some particular or particulars only, but in their entire scope and meaning, to wit, a cause of action was alleged against the defendant upon an agreement to deliver a certain number of shares of stock in exchange for real property.

Whereas the proof was directed to and showed a contract made with one C. H. Scrymser for the delivery of shares of stock in excha-ge for said real property purchased in his name and upon his own responsibility, and the shares of stock to be exchanged for which were to be fixed and determined by him, and, if not satisfactory to plaintiff, he was to have a reconveyance of his property.

2. There was no evidence whatever that the said C. H. Scrymser was authorized to act in making the contract with plaintiff for or on behalf of defendant, or that he did so act or assume to act for defendant or as its agent in any manner whatever in making such contract with plaintiff.

3. There is no evidence that the contract made by Scrymser with the plaintiff, as attempted to be proven, was ever submitted to the defendant or its terms communicated to defendant.

4. There is no evidence that defendant ever ratified or assumed in any manner any contract made between Scrymser and the plaintiff with knowledge of the facts concerning the same.

5. It nowhere appears that the plaintiff ever exercised the option reserved to himself in the agreement with Scrymser or declared whether he would keep the 3,500 shares of stock sent him by Scrymser as compensation for the interests he conveyed or asked a reconveyance to him of such interests, nor does it appear that he ever notified Scrymser or the defendant of his exercise of such option or demanded a reconveyance of the interests conveyed by him to Scrymser.

6. It nowhere appears that a definite contract was made between plaintiff and Scrymser for any number of shares, but only that Scrymser was to procure him an equitable and fair amount of the stock to be fixed by him after returning to New York, and it does not appear that the amount fixed by Scrymser, to wit, 3,500 shares, was in any way inequitable or unfair to the plaintiff.

78 7. It does not appear that the plaintiff ever offered to return the stock to the defendant or to Scrymser or in any manner communicated to the company his dissatisfaction with the

amount awarded him; on the contrary, he kept the stock, and, by his own testimony, tried to make a contract in the spring or summer of 1883, within a few months after receiving it, for a sale of the stock to a party in New York.

8. The acts and conduct of the plaintiff in keeping the stock, making no offer to return it, failing to notify the defendant of dissatisfaction with the amount awarded him, making no demand upon it for a reconveyance of the interests described in his deed to Scrymser, subsequently selling the stock received, constitute an acquiescence on his part in the award made him and the amount of shares sent to him in exchange for his deed.

9. There is no legal evidence of damages to justify or sustain the verdict.

10. The weight and preponderance of the evidence is clearly in favor of the defendant and against the plaintiff and against the verdict rendered in this case.

VI.

The verdict is against the law in this:

1. It is contrary to the instructions given by the court at the request of the defendant.

2. It is contrary to the charge of the court given on its own motion.

VII.

Error in law occurring at the trial and excepted to by the defendant in this:

1. The court erred in overruling defendant's objection to direct interrogatory No. 91, put to the witness Victor Dorne when examined on behalf of the plaintiff, and allowing the witness to answer the same.

2. The court erred in overruling the objection of defendant to questions 93 and 94 in the direct examination of said witness and in allowing said witness against those objections, in answer to said questions and the questions following, to state the witness'*es* understanding of the object and purpose of the conveyance to Scrymser and his opinion that it was to be conveyed to Scrymser for the benefit of defendant.

3. The court erred in overruling defendant's objection to the offer in evidence of the letter from plaintiff to C. H. Scrymser, dated March 5, 1883, and introduced in connection with direct interrogatory No. 104, addressed to said witness, and in admitting said letter in evidence against defendant's objection.

4. The court erred in overruling defendant's objection to direct interrogatory No. 112, addressed to said witness, and allowing said witness, in answer thereto, to testify what interest the incorporators had in the defendant company.

5. The court erred in overruling the objection of defendant to direct i-terrogatory No. 149, addressed to this witness, and allowing the witness to answer the same and other like questions without

showing that he was qualified or competent to make an
79 answer thereto, and in allowing the defendant to answer other like questions, Nos. 142, 143, 147, and others, and testify to the market value of stock in the defendant company in Deadwood, where the same witness testified there was none of the stock for sale or on the market.

6. The court erred in allowing this witness, upon his being recalled on behalf of plaintiff, to testify, in spite of defendant's prior objections to like questions, to the value of the stock in the defendant company in New York (see question 27) and in Deadwood, based upon its alleged value in New York and the cost of getting it to Deadwood. (See question 9 and questions following upon the recall of this witness.)

7. The court erred in allowing this witness to testify to and alleged contract for sale of stock to parties in New York (see questions No. 11 and following, upon the recall of the witness) after having previously limited the testimony of value to the time when the stock should reach the defendant and directing witness not to testify as to offers he had made for stock or prices at which it had been refused him or any individual instances. (See question 6 and ruling immediately preceding.)

8. The court erred in sustaining the objection of plaintiff and excluding from the deposition of C. H. Scrymser, introduced on behalf of defendant, the question, "At whose instance did you go to Deadwood on that occasion?"

9. The court erred in sustaining the plaintiff's objection and excluding from said deposition the following question offered on behalf of the defendant: "In what condition is that property today as compared with its condition when you received it from Mr. Dorne? Has any ore been taken from it? The Richmond and Eureka companies I am speaking of."

10. The court erred in sustaining plaintiff's objection and excluding from said deposition when offered on behalf of defendant the following question: "Has its value been diminished in any way?"

11. The court erred in sustaining the objection of the plaintiff and excluding from the said deposition when so offered the following question: "Is it worth as much today as it ever was?"

12. The court erred in overruling the motion of the defendant to strike out all the evidence of Victor Dorne, the plaintiff in this action, relating to the alleged negotiations or attempted negotiations for the sale of 5,000 shares of stock of the Richmond Silver Mining Company with a party in New York, and also the alleged offers to buy stock in this market with orders at a dollar a share for the purpose of making such alleged sale or negotiating for sale.

12. The court erred in sustaining plaintiff's motion to strike out the answer of the witness John M. Mordock to question No. 12 and in the court's interrogatory put in connection therewith, and also in limiting said witness's answers by its direction in connection with interrogatory No. 13.

13. The court erred in sustaining the objection of plaintiff to question No. 25, addressed to said witness, John M. Mordock.

80 14. The court erred in sustaining the objection of plaintiff to question No. 27, addressed to said last-named witness.

15. The court erred in overruling and denying the motion made by defendant at the close of the testimony, that the court upon all the evidence in the case should direct a verdict for the defendant.

16. The court erred in refusing the instruction offered on behalf of the defendant, No. 7.

17. The court erred in refusing the instruction offered on behalf of the defendant, No. 8.

18. The court erred in refusing the instruction offered on behalf of the defendant, No. 9.

19. The court erred in refusing the instruction offered on behalf of the defendant, No. 10.

20. The court erred in giving, at the request of plaintiff, his instruction No. 3.

21. The court erred in giving, at the request of plaintiff, his instruction No. 5.

22. The court erred in giving, at the request of plaintiff, his instruction No. 6.

23. The court erred in giving, at the request of plaintiff, his instruction No. 7.

24. The court erred in giving, at the request of plaintiff, his instruction No. 8.

25. The court erred in giving, at the request of plaintiff, a form of verdict for the plaintiff.

26. The court erred in its oral charge to the jury upon the question of ratification, in the second sentence thereof, from the words "but if you believe" to and including the words "directly with it."

The aforesaid motion for a new trial will be made upon affidavits and the minutes of the court; said affidavits will be hereafter served upon you, and you will also be notified of the time and place when this application for a new trial will be called up and presented to the court.

Dated Deadwood, Dakota, this 2d day of May, 1889.

W. C. KENGSLEY,
VAN CISE & WILSON,
*Attorneys for Defendant.*

To Messrs. Martin & Mason and Moody & Washabaugh, attorneys for plaintiff.

And thereafter in due time the defendant served upon the plaintiff the following affidavits in support of its said motion for new trial, all of which were duly entitled in the action:

*Affidavit of Edwin Van Cise.*

TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

Edwin Van Cise, being duly sworn, says he is a member of the firm of Van Cise and Wilson, general attorneys for the Rich-

81 mond Silver Mining Company, and who have been such attorneys for said company since 1882; that W. C. Kingsley, Esq., was attorney for the defendant in the above-entitled action and prepared the case for trial, but that this affiant entered the case about the first of April, 1889, and assisted in the trial thereof; that during said trial the plaintiff Dorne, to maintain the issues on his part and as a witness in his own behalf, testified, among other things, that he knew of no parties holding stock here in the defendant company in February, 1883, except two men, Mr. Kyte and Mr. Penniwell, who lived at Galena; that he made an effort to purchase a portion of their stock; that he offered them a price for it; that the market value in Deadwood was over a dollar; that he was refused fifteen hu-dred shares at one dollar a share; that the lowest price which he could get it for in this market was two dollars a share; that there was no stock of said company for sale in the market in Deadwood after receiving his stock in February up to, say, the first of September, 1883; that the stock he tried to purchase belonged to the two parties, Kyte and Penniwell, living at Galena, and it was there he made the effort and the offer; that there was no stock that he knew of except this Kyte and Penniwell stock on the market nearer than Chicago during the months of January, February, March, and April, 1883; that the time he approached Kyte and Penniwell was about June; that he did not think there was any stock of defendant company in this country except theirs and his own; there was none on the market; that there was none of the stock anywhere in this country that he could find except this Kyte and Penniwell stock; that he was informed by Kyte or Penniwell, or both of them, that they had sold out and would sell more stock easily at prices three or four dollars a share, as he understood, and that he thought it was Mr. Penniwell with whom he talked about the Richmond stock.

That said witness, Dorne, at the same time further testified, in connection with the testimony already given, that he gave orders here to buy stock at a dollar a share in the spring of 1883; that the market price in New York in February, March, April, and May and June, 1883, was $1.50 a share; that it would cost one dollar to produce it in Deadwood, and it was worth in Deadwood $2.00 a share; that within a few months after he received the thirty-five hundred shares of stock from Mr. Scrymser he contracted for the sale of five thousand shares of stock at $1.50 a share to a party in New York, received the money therefor in a draft for $7,500, and tried to buy fifteen hundred shares in Deadwood to add to the 3,500 shares he had for the purpose of filling his alleged New York agreement, and in addition to his alleged efforts to buy of Kyte and Penniwell he gave orders to brokers here to buy fifteen hundred shares of such stock at $1.00 in the spring of 1883, about the month of June; that the brokers to whom he gave these orders were John Gaston, John Cranstoun, and Mr. Howsley, who were dealing in stocks in Deadwood at the time; that he ordered through these men what they could buy, up to 1,500 shares, at $1.00 a share; that he ordered through each of these brokers, but he did not get the stock.

That said witness, Dorne, further testified upon said trial that he was a one-seventh owner in the entire interest of the company; that was the original plan upon which he purchased the property; that for the six-sevenths of two-thirds he received by way of compensation one-seventh of two-thirds; that he was to have one-seventh interest in the company for his pay, whether it was the Richmond or anything else.

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This affiant further says he was present and heard the testimony of said witness, Dorne, hereinbefore cited and referred to, and was surprised thereat and believed the truth upon these points to be otherwise than as then stated by said Dorne, but that we then had no means at hand of ascertaining the truth or falsity of said testimony, and did not have until after the trial was concluded; that affiant and his associate further believed that the court would strike out all of said witness' testimony relating to alleged efforts to buy stock of Kyte or Penniwell, and through brokers in Deadwood, because we had urged it was incompetent, and the court had, as we understood its ruling, first sustained our position and excluded such testimony, instructing the witness that he must confine his testimony to the knowledge of the value and not what he was refused stock at, and that he could state, if he knew, where there had been considerable transactions in it, what it brought in the market, but he could not state individual instances, and, relying on this ruling, after the full examination of the witness developed the fact that his testimony as to a market value in Deadwood was wholly based on individual instances and what he was refused stock at, alleged offers to Kyte or Penniwell and orders to the brokers named, we moved the court on the last day of the trial, to wit, on Friday, April 12th, 1889, at the opening of the court, at 10 o'clock a. m., to strike out all the evidence of plaintiff relating to alleged negotiations or attempted negotiations for the sale of 5,000 shares of defendant company's stock with a party in New York, and also the alleged efforts to buy stock in this market, with orders at a dollar a share, for the purpose of meeting such alleged sale or negotiation for sale, and we were surprised and disappointed when the court overruled our motion; that we were then unable to communicate with witnesses to ascertain the truth or falsity of plaintiff's statements hereinbefore referred to; that R. H. Howsley, one of the brokers referred to by witness Dorne, was then and had been for some time in the State of Kansas; that John Cranstoun, another of said brokers, was then and had been for some time residing in the Territory of Washington; that Mr. Penniwell was then and had been for some time out of the Territory, and his address was then unknown to affiant, and that Mr. Kyte was then residing at Galena and was not in Deadwood, and that within an hour or two after our motion to strike out said evidence of Dorne the evidence was all in and both sides had rested; that it was, therefore, too late to call Mr. Kyte or communicate with him; that affiant is well acquainted with him, but had never before the trial talked with him or been aware that he knew anything bearing upon this case or that he could testify, regarding any of the matters likely to arise therein;

that affiant had once or twice within the few months previous to the trial called for Mr. Kyte by telephone on other business, and always had to wait some time to get an answer, as he had to be brought some distance to the telephone, either from his place of work, if during working hours, or
83 from such place as he might be found at other times, and, as Dorne had said he thought his talk was with Penniwell, affiant did not deem it of so much importance to call for Kyte, with the uncertainty about getting him and the short time left for so doing; that we subpœnaed such witnesses as we could find to testify in contradiction of Dorne that neither Cranstoun nor Howsley was in the stock business in Deadwood in 1883, but we could get nothing from them except their own lack of knowledge or uncertain belief on the subject; that Mr. Gaston was subpœnaed, but was late coming into court Friday morning for some reason, and affiant, not seeing him there when needed, asked a little delay, but the court declined to wait on us longer for his testimony and that of others, also late, regarding Cranstoun and Howsley; but the only testimony then available was of the uncertain character above stated; that Mr. Gaston would have testified, as he stated to affiant, that he kept no entries or account of orders to buy; he had no recollection of Dorne's ever ordering from him any stock in the defendant company in 1883 at any price; that the case was given to the jury on Saturday, April 13, 1889, and a verdict rendered for the plaintiff; that on the afternoon of that day or on Monday affiant telephoned Mr. Kyte at Galena to come into Deadwood, and that he came either on Monday, April 15th, or Tuesday, April 16th, and affiant then talked with him and obtained from him a denial of Dorne's statements, so far as they related to him personally. Affiant, at the same time, obtained from said Kyte the address of Mr. Penniwell, to wit, Anaconda, Montana, and on the 15th or 16th of April, 1889, obtained from other parties the address of Mr. Howsley as Leavenworth, Kansas, and Mr. Cranstoun as Seattle, Washington Territory, and on the 16th of April, 1889, affiant wrote to each of these parties, as hereinafter stated. On the 23rd of April, 1889, affiant obtained from said Kyte an affidavit, which he submits herewith.

Affiant further says that on the 16th day of April, 1889, he wrote and addressed to J. S. Penniwell, at Anaconda, Montana (where affiant was told by J. W. Kyte said Penniwell resided), the following letter, stating the testimony of Dorne as affiant then remembered it and understood counsel for plaintiff to remember it before a transcript had been made:

DEADWOOD, DAKOTA, *April* 16, 1889.

J. S. Penniwell, Esq., Anaconda, Montana.

DEAR SIR: In a case tried here last week Victor Dorne testified that in the spring or summer of 1883 he offered you first $1.00 and then $2.00 a share for Richmond Mining Company's stock and you refused it. Do you recollect any such offer? Mr. Kyte says he never heard of it and does not think such an offer was made, as he

and you sold some 20,000 or 30,000 shares (we forget the exact number) for 10 cts. a share and never heard of any offer here of any kind in 1883. Will you kindly write us your recollection?

Yours, VAN CISE & WILSON.

84 That affiant caused this letter, enclosed with a return envelope, to be posted to said Penniwell, and that in due course of mail, on or about the 30th day of April, 1889, the following letter was received by the firm of Van Cise & Wilson, enclosed in an envelope, addressed to them in affiant's handwriting, at Deadwood, Dakota, which letter affiant believes to be in the handwriting of J. S. Penniwell and to have been written by him, and which affiant will produce in court with this affidavit:

ANACONDA, MONT., *April* 23, 1889.

Van Cise & Wilson, attorneys-at-law at Deadwood, D. T.

GENTLEMEN: I will try and write you a few lines in answer to yours of the 16th, in which you said that Victor Dorne had swore that he had offered me one dollar per share for Richmond stock and that I refused the offer, and that he had offered me two dollars and that I refused to sell at that price. I must say that Victor Dorne swore to a point-blank lye. It would not be worth while for me to say any more.

Yours truly, J. S. PENNIWELL,
*Anaconda, Mont.*

Affiant has prepared an affidavit setting forth the foregoing facts and mailed the same to J. S. Penniwell at Anaconda, Montana, requesting him to sign and verify the same and return at once, and affiant will try to have the same ready for the hearing of this motion for new trial, and will ask the court to grant time to serve and file such affidavit if received and leave to use the same on the hearing of said motion.

Affiant further says that on the 16th day of April, 1889, he wrote to R. H. Howsley on the subject of the witness Dorne's statements regarding himself, and received an answer from him about May 5, 1889, stating that he was not in Deadwood in 1883, and first started for the Black hills June 6, 1884, and that he never met Victor Dorne until after the suit concerning the Horse Shoe mining claim (which, affiant is informed by Judge Church, one of Mr. Dorne's counsel in that case, was some time in 1886 or 1887), and that he had no recollection of ever talking with Dorne concerning Richmond Mining Company stock. Mr. Howsley returned to Deadwood May 18, 1889, and affiant has secured his affidavit, which he submits herewith.

Affiant further says that on the 16th day of April, 1889, he wrote and addressed to John Cranstoun at Seattle, Washington Territory, the following letter, which, with a return envelope inclosed therein addressed by affiant to Van Cise & Wilson, Deadwood, Dakota, he caused to be duly deposited in the post office here:

DEADWOOD, DAKOTA, *April* 16, 1889.

J. A. Cranstoun, Esq., Seattle, Washington Ter.

DEAR SIR: It was testified in court last week by Mr. Dorne that in 1883, in the spring or summer, he offered you $1.00 a share for Richmond Mining Co. stock and left a standing offer with you for 1,000 shares. We contended you were not here at that time, but in Lead City. Have you any recollection of Dorne's leaving an order with you for Richmond stock in 1883 or for any other stock?

An answer will greatly oblige us, and we will be glad to
85 respond with a favor when in our power.

Yours truly, VAN CISE & WILSON.

That for some reason the letter was delayed in the mails and affiant heard nothing from it until May 18, 1889, when a telegram was received by Van Cise & Wilson, dated Seattle, W. T., 17th, reading, "Your letter just received. Have answered tonight," signed J. Cranston; and on May 24th, 1889, a letter was received by Van Cise & Wilson, inclosed in an envelope addressed to them in affiant's handwriting, which letter is signed J. Cranstoun, and is, as affiant states, from familiarity with the handwriting, from the John Cranstoun referred to by the witness Dorne. Said letter will be produced and submitted at the hearing of the motion for new trial and, omitting his excuse for delay and other immaterial matters, is as follows:

"I do not know the exact date I left the Homestake, but it was some time in the spring of 1883. You can find the exact date from Mr. Grier and let me know. I then went to Galena with Thomas McMaster, when he examined the Sitting Bull, and from there I went to the Iron Hill. I was at no time prior to the partnership formed with McDonough in the spring of 1887 engaged in the buying and selling of stock, and Dorne never left any order with me to buy Richmond or any other stock at the time mentioned. In fact, I have no recollection of even being acquainted with him until the fall or winter of 1887, as I think I made a trade with him or partly negotiated one through the telephone, and I afterwards met him, I think, in Koenigsberger's store for the first time to know him; at least, that is the best of my recollection. I cannot think of the name of the stock, but probably you can remind me. It was the mine which there was trouble about in Galena, and the adverse interests were consolidated and the name of the company was changed. W. L. McLaughlin was secretary of the new corporation."

Affiant further says that he has prepared and forwarded to Mr. Cranstoun an affidavit embodying the material parts of his letter, and sent it to him at Seattle, Washington Territory, and hopes to have it returned in time for use upon the hearing of the motion for new trial, and will then ask leave of the court to use the same, and that time may be given for that purpose; and affiant says that he believes the witnesses Kyte and Howsley will testify in case of a new trial, as stated in their affidavits, and that Penniwell and Cranstoun will testify substantially as stated in their letters, and that their testimony will be the truth and material to this case and the

defense set up in this action; that affiant did not know at the time of the trial what they or either of them would testify to on these subjects, and did not learn and had no means of learning what they would testify until after the trial, as hereinbefore stated; that he did not know where any testimony of like character could be obtained or any witnesses be found by whom these facts asserted by them could be established, and affiant believes that their testimony can be obtained for a new trial, and, if obtained, that it will produce a different verdict from that rendered in this action.

Affiant further says that after said Dorne had testified as in this affidavit hereinbefore set forth, and affiant and Judge Kingsley had talked of their surprise thereat, to wit:

86 About April 11, 1889, Judge Kingsley stated to this affiant that he had a dim recollection of some testimony furnished by Dorne in a hearing before Tom Hooper, referee in the case of Victor Dorne *vs.* Elias Adduddell, heretofore heard in this court, in which said Dorne testified concerning some of the same matters, but just how he testified Judge Kingsley said he could not remember. Affiant was not employed in any manner in said case of Dorne *vs.* Adduddell and had no knowledge of said testimony, but he requested the deputy clerk, Louis Caulfield, to look it up for him on or about the 11th day of April, 1889, and said Caulfield reported to this affiant the same day that he could not find any testimony of Victor Dorne in said case of Dorne *vs.* Adduddell among the files of this court. Affiant also telephoned to Rapid City and had search made there upon a suggestion that the case had been brought in Pennington county, but learned that no papers in the case were to be found there. After this case was concluded, to wit, during the week following, to affiant's best recollection, affiant asked Frank G. Abbott, the stenographer of this court and with whom Tom Hooper had been in partnership about the time the case of Dorne *vs.* Adduddell was brought and during the time it was pending, whether he had in his possession any notes of testimony taken by himself or Hooper in said case. A day or two later said Abbott reported he had no notes of that kind. Affiant and Judge Kingsley then agreed to have a thorough and exhaustive search of the files of the clerk's office made for the purpose of finding said testimony if possible, and to this end took with them to the clerk's office Alvin Clark, an employé in the office of Van Cise & Wilson, and asked and obtained leave of the clerk for said Clark to look through the files of old and disposed-of cases for the purpose of finding, if possible, said testimony of Dorne. The first place suggested by Judge Kingsley for his search was a little triangular room on the stairway and adjoining the clerk's office, and there in the presence of affiant and Judge Kingsley said Clark almost immediately on beginning his search found at the top of a box of papers of different kinds a large bunch of papers belonging to the case of Dorne *vs.* Adduddell, including the testimony of Dorne taken before the referee; that thereupon Judge Kingsley and affiant examined the same and found therein the following questions and answers in said Dorne's testimony

bearing on the subjects to which he had testified in this action, as hereinbefore stated:

Q. 55. Since the formation of this copartnership you have become the owner of certain interests in the Richmond and Eureka lodes, have you not?

A. No, sir; I hold the deeds and papers in my name.

Q. 56. What do we understand by that?

A. That it belongs to other parties.

Q. 57. Is Addudell one of these other parties?

A. No, sir.

Q. 58. About when were these interests conveyed to you in the Richmond and Eureka lodes—that is, the *1a* of $\frac{2}{3}$ of the Richmond and Eureka?

A. I retained $\frac{1}{7}$ out of $\frac{2}{3}$ and deeded $\frac{6}{7}$ of $\frac{2}{3}$ to other parties on the 20th day of February, I think, 1882; it was in February at least.

87 Q. 59. Did you not convey the whole of your interest in that property to those companies and then they conveyed back to you this $\frac{1}{7}$ of $\frac{2}{3}$?

A. No, sir.

Q. 60. Since that time you have sold that interest, have you not?

A. I have not. I have never owned it to sell; never been able to sell it.

Q. 61. Isn't there an action pending by you against the Richmond Company for the value of that interest?

A. Yes, sir.

Q. 62. Did you not in that action swear that the Richmond Company was indebted to you for the unpaid balance of that $\frac{1}{7}$ of $\frac{2}{3}$ interest?

A. Yes, sir.

Q. 63. How do you reconcile that situation, that you do not own it?

A. Because when I originally came into possession of it the possession was put in my name, although it belongs to other parties; other parties furnished the money and agreed to furnish any further necessary means that would be used in the enterprise.

Q. 64. You have received, have you not, from the Richmond Company a certain number of shares of their stock?

A. Yes, sir.

Q. 65. What was the value of those shares that you received?

A. I have no idea.

Q. 66. You had an idea when you brought that suit, had you not?

A. I founded my idea on reports.

Q. 67. On the 20th day of September, 1883, you claimes to know that those shares had a certain value, did you not?

A. Yes, sir; I tried to make some inquiries, and I based my idea on those inquiries—on the answers to those inquiries, which, however, I have failed to be able to substantiate.

Q. 68. Well, what was your information then of the value of those shares.

A. I believe, in my claim upon the Richmond Company, I made the valuation of the shares at $1.50.

Affiant further says that the testimony of said witness, Dorne, before said referee, Hooper, purports to have been taken April 1st, 1884, and was used, as affiant is informed, upon the hearing of said cause of Dorne *vs.* Adduddell in this court; and affiant believe- that it seriously contradicts the statements made by the witness Dorne in the trial of this action hereinbefore referred to, and that if a new trial can be had when this testimony can be produced and used that it will tend to produce a different verdict; and affiant believes that if all the evidence hereinbefore referred to can be submitted on a new trial that the verdict will be different, for that this affiant believes the verdict heretofore rendered herein was arrived at on the testimony of Dorne proposed to be contradicted by the showing affiant has made herein, and in support of affiant's belief that the verdict was thus arrived at he submits herewith the affidavit of sundry jurors on the subject.

88 Affiant further says he makes this affidavit rather than any officer of the defendant company because he has more knowledge of the facts set forth herein than any officer of said company; that said company is a foreign corporation and has no office or agent in the Territory except affiant and has had none other here except temporarily for the last few years, and that this affiant is and has been since May 21, 1887, the resident agent of the company, duly appointed as such under and in accordance with the requirement of section 569 of the civil code of Dakota.

EDWIN VAN CISE.

Subscribed and sworn to before me this 1st day of June, A. D. 1889.

JOHN R. JONES,
*Notary Public.*

[SEAL.]

89 *Affidavit of William C. Kingsley.*

In the District Court for Lawrence County, Dakota.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant.

TERRITORY OF DAKOTA, } *ss:*
*County of Lawrence,* }

William C. Kingsley, being duly sworn, says he is one of the attorneys in the above-entitled case for the said defendant, and as such prepared said case for trial and, in connection with Mr. Van Cise, tried the same; that affiant has heard read the affidavit made herein of Mr. Van Cise and all of the statements in said affidavit with reference to the testimony given upon the trial of this cause by Mr. Dorne as a witness in his own behalf, and that all of said state-

ments with reference to said testimony so made by Mr. Van Cise in his said affidavit are known to be true by this affiant, and are by him therefore verified and made his statement without repetition in this affidavit and with the same effect as though they were herein incorporated and repeated herein in full. For a more particular reference to that portion of Mr. Van Cise's affidavit to which affiant has referred and which he makes a part of this affidavit reference is made by way of identification to that portion of Mr. Van Cise's affidavit beginning on page 1 with the words "that he knew of no parties holding stock," etc., and ending with the words "that he was to have one-seventh interest in the company for his pay, whether it was the Richmond or anything else," on page 3 of said affidavit of Mr. Van Cise. Affiant further states that he was present and heard the testimony so given of said witness, Dorne, heretofore stated and referred to in the affidavit of Mr. Van Cise, and was surprised thereat, and believe- the truth upon this point to be otherwise than as stated by said Dorne, but that neither affiant nor his co-counsel, Mr. Van Cise, had any means at hand of ascertaining the truth or falsity of said testimony and did not have until after the trial was concluded; that affiant and his associate further believed that the court would strike out all of said Dorne's testimony referring to his alleged efforts to buy any stock of Kyte or Penniwell or through brokers in Deadwood, because we had urged it was incompetent, and the court had, as we understood its ruling, first sustained our position and excluded said testimony, instructing the witness that he must confine his testimony to his knowledge of the value and not what he was refused stock at, and that he could state, if he knew where there had been considerable transactions in it, what it brought in the market, but he could not state individual instances, and they, relying on this ruling then made by the court, after the full examination of the witness, developed the fact that his testimony as to the
90 market value in Deadwood was wholly based on individual instances and what he had been refused stock at and his alleged offers to Kyte and Penniwell and orders given by him to the brokers named. Affiant and his associate, as counsel for the defendant, on the last day of the trial, which was on April 12, 1889, at the opening of the court, at 10 o'clock a. m., moved to strike out all the evidence of the plaintiff relating to said negotiations or attempted negotiations for the sale of 5,000 shares of his stock in the defendant company with a party in New York, and also the alleged offers to buy any of this alleged stock in this market with orders at a dollar a share for the purpose of filling such alleged sale or negotiations for sale, and affiant states that he was surprised when the court overruled the said motion. The defendant's said counsel were then unable to communicate with any witnesses in order to ascertain the truth or falsity of plaintiff's said statements hereinbefore referred to; that Mr. Howsley, one of the brokers referred to by the said Dorne in his testimony, was at the time of the trial of this case, and had been for some time, in the State of Kansas; that John Cranstoun, another of said brokers, was at the time of said trial, and

had been for some time, residing in the Territory of Washington; that Mr. Penniwell at said time was and for some time had been out of this Territory, and his address was then unknown to this affiant; and that Mr. Kyte was then residing at Galena, and was not in Deadwood, to affiant's knowledge, during said trial; and that within a short time, perhaps an hour or so after the defendant's said motion to strike out said evidence of Dorne, the evidence on both sides was all in and both sides had rested, so that it was too late to call Mr. Kyte or communicate with him; that witnesses (such as could be found in the short time at our disposal) were produced on behalf of the defendant to testify with reference to the non-residence or presence here of said Howsley and Cranstoun at the time when Dorne testified that he gave them said orders for stock, but that their testimony with reference to said Cranstoun and Howsley and their absence from Deadwood in 1883 was quite uncertain and inconclusive because of a lack of knowledge on the part of said witnesses with reference to the subject, being unable to testify to anything more than a vague belief on the subject.

Affiant further says that this case was given to the jury Ap'l 13, 1889, as he remembers, and a verdict rendered for the plaintiff. Affiant further says that he has read that portion of Mr. Van Cise's affidavit, and believes the same to be true, referring to the interview with and affidavit made by Mr. Kyte in this matter; the correspondence with and intelligence received from Mr. Penniwell and Mr. Cranstoun, and also the affidavit made by Mr. Howsley herein, and believes that the statements made by all of said parties in contradiction of the testimony so given by Mr. Dorne are true, and that the affidavits of Mr. Cranstoun and Mr. Penniwell will so show when produced, and that they will be received and available upon the hearing of this motion, but,
91 if not, that affiant will, with his associate, ask the court to grant necessary time to serve and file said affidavits, with leave to use the same on the hearing of this motion, and affiant says that he believes the witnesses Kyte and Howsley will testify in case of a new trial as stated in their affidavits, and that Penniwell and Cranstoun will testify substantially as stated in their letters referred to in the affidavit of Mr. Van Cise, and that their testimony will be the truth and material to this case and the defense set up in this action; that affiant did not know at the time of the trial what they or either of them would testify to on these subjects and did not learn and had no means of learning what they would testify to until after the trial as hereinbefore stated; that he did not know where any testimony of like character could be obtained or any witnesses be found by whom these facts asserted by them could be established, and affiant believes that their testimony can be obtained for a new trial, and if obtained it will produce a different verdict from that rendered in this action. Affiant further says that in the year 1884 there was a case pending in this court between Victor Dorne, as plaintiff, and one Elias Adduddell, as defendant, for a settlement of partnership matters between them; that said action arose out of a partnership formed between said parties upon a written agreement

dated on the 28th day of September, 1881, and that among other controverted questions between them was the right of said Adduddell to any interest which Dorne had or may have had in said Richmond and Eureka mining claims or to share in any proceeds which the said Dorne may have realized from the sale of the said interest or to have any interest in the thirty-five hundred shares of stock in this defendant company which Dorne had received in February, 1883. In that action Dorne denied that Mr. Adduddell had any right to any of this stock, and, to maintain that view on his part, among other reasons, his testimony was taken in said case before one Thomas Hooper, a referee appointed by the court for that purpose and who proceeded to and did take Mr. Dorne's testimony in that case, which is now on the files of this court and constitutes part of the proceedings upon which the said referee based his report rendered in said case; that this affiant was associated in said case with Mr. Mitchell, of Rapid City, as one of the attorneys for the defendant Adduddell; that whether himself or Mr. Mitchell was present at the time the plaintiff gave his testimony before the referee hereinbefore referred to he does not now remember; whether he was or not, affiant had a very vague impression at the time of the trial of this case of Dorne against the Richmond Mining Company that the plaintiff in giving his testimony referred to before said referee had made some statements with reference to his connection with these Richmond and Eureka mining claims and his transactions resulting in disposing of them to this defendant which were not in entire accord with his testimony given in this case with reference to his interests in said claims and which are referred to in Mr. Van Cise's affidavit, but that affiant had no particular recollection
92 what the purport of such testimony was, and none whatever as to Dorne's testifying about the value of this stock, and that this affiant, for the purpose of ascertaining what the plaintiff did testify to in this suit before the referee, commenced, during the trial of this case, a search in the clerk's office of this court for the papers in that case of Dorne against Adduddell and verifies herein what Mr. Van Cise has stated with reference to the attempts to find said papers and testimony of plaintiff, as well here as at Rapid City, but that such search was unavailable until the subsequent efforts, as stated by Mr. Van Cise, when they were found by the young man Clark, employed in his office, as Mr. Van Cise has stated. This affiant states that he was surprised at the testimony so given by this plaintiff in this case as so stated by Mr. Van Cise. Affiant is now of the impression that, during the trial of this case and while he was searching for said testimony in the case of Dorne against Adduddell in the clerk's office of this court, among other places in which he searched was in the little room off from the clerk's office referred to by Mr. Van Cise, wherein is a box containing quite a large number of papers in old cases, but that, if this affiant did search then at that place, he failed to find the papers in question, but that they were found by the said Clark, in the presence of affiant and Mr. Van Cise, on the top of said papers in said box, from which

this affiant is led to believe that said papers had been placed there after the trial of this case was closed; that as soon as the papers in said case were found this affiant, in connection with Mr. Van Cise, examined them and found therein the questions and answers contained in the affidavit of Mr. Van Cise, beginning with question 55, on page 11 of Mr. Van Cise's affidavit, and ending with answer to question 68, found on page 12 of Mr. Van Cise's affidavit; that this affiant has compared said questions and answers as embodied in Mr. Van Cise's affidavit with the original paper embracing the same and finds them to be correct, and so makes them a part of this affidavit the same as if they were herein repeated. Affiant further states that he believes that the testimony so given by this plaintiff in his said suit with Addudell seriously contradicts the statements made by him in the trial of this action hereinbefore referred to and embraced in the affidavit of Van Cise, and affiant believes that if a new trial can be had when this testimony can be produced and used that it will be quite certain to produce a different verdict from that rendered herein; that affiant believes that if all the evidence hereinbefore referred to can be submitted on a new trial of this case that the verdict will be different for the reason that this affiant states that the verdict heretofore rendered herein was arrived at solely from the testimony of Mr. Dorne, which it is now proposed to contradict upon a new trial where the showing which we make herein and in support of affiant's belief that the verdict will be different upon a new trial and that it was upon the sole testimony of the plaintiff as given in Mr. Van Cise's affidavit that the verdict herein was rendered can be
93 fully proven. The affidavits of several of the jurymen are herewith submitted in support of this statement of affiant. Affiant says that he makes this affidavit rather than any officer of the defendant company for the reason that he has more knowledge of the facts set forth herein than any officer of said company; that said company is a foreign corporation and has no officer or agent in the Territory otherwise than as Mr. Van Cise has stated in his affidavit, and has not had for the last few years. Affiant states that he had no knowledge of any of the testimony which is referred to in this affidavit, which it is proposed to use on behalf of the defendant in case a new trial is granted, further than he has hereinbefore stated. Affiant states that he has requested John A. Gaston to make his affidavit of a want of any recollection of having received from Mr. Dorne any order for any Richmond stock, as stated by said Dorne upon the trial of this case, but that Mr. Gaston declined and refused to give or make any affidavit in reference to the matter, giving as a reason that he did not wish to take any part in the controversy, as it might injure his business as stockbroker. Affiant states that said Gaston has told the affiant that he has no recollection of ever receiving any order from Dorne for the purchase of any of said stock.

WILLIAM C. KINGSLEY.

Subscribed and sworn to before me this 1st day of June, 1889.

[SEAL.] JOHN R. JONES,
*Notary Public.*

*Affidavit of J. W. Kyte.*

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't. } Affidavit of J. W. Kyte.

TERRITORY OF DAKOTA, } *ss:*
*Lawrence County,* }

J. W. Kyte, of lawful age, being sworn, says he resides at Galena, in Lawrence county, Dakota, and was residing there in 1882 and 1883, and was then a stockholder in the Richmond Silver Mining Company; that there was no market in Galena or in Deadwood during 1883 for the stock of that company: that either in the latter part of 1882 or early in 1883 affiant and J. S. Penniwell tried to sell some of their stock and could find no market for it in this county, and finally succeeded in selling 30,000 shares of it at ten cents a share, through the help of John M. Mordock, as a personal favor to us, to a friend of his in Illinois, either at Geneva or Chicago, affiant is not sure which. Affiant was, in 1883, well acquainted with the plaintiff, Victor Dorne, and affiant was not, in that year or at any other time, offered by said Dorne one dollar a share or any other price whatever for stock in the Richmond Silver
94 Mining Company, nor did affiant, in that year or at any other time, refuse to sell said Dorne such stock at one dollar a share, nor did affiant at any time inform said Dorne that affiant and Penniwell had sold out, or that he or they would sell more stock in said company at three or four dollars a share, or anything of the kind, and affiant never had any talk with said Dorne at any time concerning the sale by affiant to Dorne or the purchase by Dorne from affiant of stock in the Richmond Silver Mining Company to any amount at any price whatever. J. W. KYTE.

Subscribed and sworn to before me this 29th day of May, 1889.
[SEAL.] R. H. GERARD,
*Notary Public, Lawrence Co., Dakota.*

*Affidavit of R. H. Howsley.*

In the District Court, First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't. }

TERRITORY OF DAKOTA, } *ss:*
*Lawrence County,* }

R. H. Howsley, of lawful age, being sworn, says he was engaged in the business of brokerage and buying and selling stocks at Dead-

wood in 1886 and 1887; that prior to June, 1884, he resided near Leavenworth, Kansas, and was not in Deadwood at any time during 1883 or at any time until June, 1884, when he came here. Affiant was never acquainted with Victor Dorne until the latter part of the year 1887, and has no recollection of ever receiving from him an order for any kind of mining stock or having any business talk with him of any kind whatever, and is positive he did not have before 1887.

R. H. HOWSLEY.

Subscribed and sworn to before me this 20th day of May, 1889.
[SEAL.] JOHN R. JONES,
*Notary Public.*

*Affidavit of Edgar L. Winn and Others.*

In District Court, First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

TERRITORY OF DAKOTA, *Lawrence County,* } ss:

Edgar L. Winn, Wm. Thompson, J. S. Kelly, and T. P. Edwards, being duly sworn, say, each for himself and not one for the other, they were members of the jury which heard the trial of the above-entitled action, and on April 13, 1889, returned a verdict therein; that in arriving at said verdict the jury allowed plaintiff the amount of stock claimed by him in his complaint and found the stock to be of the value of one dollar a share, and added thereto interest at seven per cent. per annum from the time when it should have been delivered, and that they based their valuation of one dollar a share solely on the testimony of the plaintiff, Dorne, that he gave orders to brokers, John Gaston, John Cranstoun, and Mr. Howsley, in June, 1883, to buy him fifteen hundred shares of the stock at one dollar a share.

95

EDGAR L. WINN.
WM. THOMPSON.
J. S. KELLY.
T. P. EDWARDS.

Subscribed and sworn to before me this 25th day of May, 1889.
[SEAL.] JOHN R. JONES,
*Notary Public.*

To the reading of this affidavit of jurymen counsel for plaintiff objected; which objection was sustained by the court; to which counsel for defendant duly excepted.

And in due time the defendant served the following additional affidavits, properly entitled in the action, in support of said motion:

*Affidavit of Edwin Van Cise.*

In the District Court, First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

TERRITORY OF DAKOTA, *Lawrence County,* } *ss:*

Edwin Van Cise, being sworn, says: At the time of the trial of the above-entitled action the plaintiff, Victor Dorne, among other things testified that he had sold or contracted for the sale of five thousand shares of Richmond Silver Mining Company stock in New York city, in 1883, at $1.50 a share; that it was sold through friends of his there to parties he did not know; that he received the money therefor in a draft from a broker's office or a bank; that he did not know who the individual was that sent him the draft, but that the name of the friend who made the sale for him was R. A. Marston; that he had not Marston's post-office address, but once had it; that it was New York somewhere; that he could not give it, but possibly could procure it for defendant's counsel; that he would telegraph to New York was the only way he knew how to do it, and if it could be got he would turn it over to us; that affiant and his associate, W. C. Kingsley, were surprised at this testimony, but had no witnesses at hand or other means to contradict it and were then unadvised whether the same were true or false; that after
96 the conclusion of the trial affiant write to Henry Earle, in New York city, the substance of said testimony, and asked his views upon it; said Earle was then and is the vice-president of the defendant and the representative of said company with whom we are accustomed to correspond concerning said company's affairs; that said Earle was absent for some time from the city and was unable to look up the matter until his return; but upon his return he made inquiry and reported to affiant that he could not find R. A. Marston or learn of any one who knew him, although he had made search and inquiry. Affiant then wrote to said Earle requesting that he send an affidavit or affidavits to this effect for use on the hearing of the motion for new trial in this action. In response to this request affiant has this day received the affidavits of Henry Earle, Clarence H. Scrymser, and Amos J. Holahan, which are submitted herewith; that affiant knows of no witness nearer than New York from whom he could obtain the same information; that he knew of none at the time of the trial; that Victor Dorne has not furnished the address of R. A. Marston to affiant, and affiant is informed by Judge Kingsley that he has not furnished it to him; that since the ruling of the court denying defend-

ant's motion to strike out said Dorne's testimony concerning his contract with a New York party for sale of Richmond Silver Mining Company stock the testimony furnished by the accompanying affidavits becomes material and affiant believes it can easily be secured upon a new trial, and, if secured in connection with the testimony of Cranston, Howsley, and Penniwell, referred to in former affidavit, that a new trial will result in a verdict for defendant, and that such newly discovered evidence will be the means of securing such verdict. Affiant further says that he had no knowledge at the time of the trial that there was no such name as R. A. Marston on the New York Directory or that Dorne was testifying otherwise than truthfully concerning the alleged transaction in which he was said to have a part, and affiant believes that allowing said testimony to go to the jury uncontradicted was very prejudicial to defendant at the recent trial.

EDWIN VAN CISE.

Subscribed and sworn to before me this 15th day of June, 1889.
[SEAL.] JOHN R. JONES,
*Notary Public.*

*Affidavit of W. C. Kingsley.*

In District Court, Lawrence County, Dakota.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

TERRITORY OF DAKOTA, *Lawrence County,* } *ss:*

W. C. Kingsley, being sworn, says that he has read the affidavit of Edwin Van Cise made this day in the above-entitled case, and that affiant corroborates all that portion of said affidavit in which is stated the testimony of said plaintiff in regard to a sale in 1883 of 5,000 shares of Richmond Silver Mining Company's stock in New York city, the reception of a draft therefor, plaintiff's ignorance of the person's name who sent the draft; the name of
97 R. A. Marston, who made said sale; plaintiff's ignorance of the P. O. address of said Marston; his promise to telegraph for it, and, if obtained, the promise to turn it over to defendant's counsel.

That affiant was surprised at this testimony and had no witnesses available by which it could be contradicted, and was then not advised whether said testimony was true or not.

Affiant states that he has read this day the affidavits of Henry Earle, Clarence H. Scrymser, and Holahan, referred to in Mr. Van Vise's affidavit, and knows of no other witness from whom the same information given in their said affidavits can be obtained and did not know of any at the time of the trial of this case, and did not know of this until just now, today, as stated; that plaintiff has not

furnished the address of R. A. Marston to affiant, and that the refusal of this court to strike out the plaintiff's testimony concerning his said sale of said 5,000 shares of stock renders material the testimony furnished by the said affidavits of Earle, Scrymser, & Holahan, and affiant believes it can be secured upon a new trial, and that if secured will, in connection with the testimony of Cranston, Howsley, & Penniwell, referred to in former affidavits already served upon the plaintiff's counsel in support of defendant's motion for a new trial of this case, result in a verdict for defendant, and that such newly discovered evidence will be the means of securing such result.

Affiant further says that he had no knowledge at the time of the trial that there was no such name as R. A. Marston in the New York Directory or that plaintiff was testifying otherwise than truthfully concerning the alleged transaction of sale of stock, and affiant believes that such evidence going to the jury uncontradicted was very prejudicial to defendant at the trial of this case.

W. C. KINGSLEY.

Subscribed and sworn to before me this 14th day of June, 1889.

[SEAL.] JOHN R. JONES,
*Notary Public.*

*Affidavit of Henry Earle.*

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Earle, being duly sworn, says: I reside in the city of Brooklyn, and am engaged in business in the city of New York as a broker. I have been a member of the New York stock exchange for fourteen years, up to 1885. I have never known any person of the name of R. A. Marston. I have today made inquiry from George W. Ely, secretary of the New York stock exchange, and who has been secretary for more than ten years; said Ely, in my presence, examined the records of said exchange since the year 1882 and found that no R. A. Marston was ever a member thereof
98 nor had said Ely ever known or heard of a person of that name. I have also made inquiry of A. H. Calhoone, who has been a member of said exchange for over twenty years and during all that time engaged in business in the city of New York, but he had never known or heard of any person of the name of R. A. Marston. In the city directory of said city of New York for the years from 1884 to 1889, inclusive, which I have examined, the name R. A. Marston does not appear; said directories include the

names of persons who have business offices in New York city, but reside elsewhere, as well as of all residents of said city. I have to-day called upon Mr. R. J. Marston, Mr. W. H. Marston, and Mr. John D. Marston, business men in the city of New York. None of them had ever known or heard of any R. A. Marston.

HENRY EARLE.

Sworn to before me this 11th day of June, 1889.

PHILIP G. BARTLETT,
*Notary Public, New York County.*

[SEAL.]

STATE OF NEW YORK,
*City and County of New York,* } *ss:*

I, Edward F. Reilly, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Philip G. Bartlett, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county the 11 day of June, 1889.

[SEAL.] EDWARD F. REILLY, *Clerk.*

*Affidavit of Clarence H. Scrymser.*

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Clarence H. Scrymser, being duly sworn, says: I reside in New York city; I am president of the defendant above named. I have made careful and diligent search in the city directory of New York city for each and every year from and including the year 1881 to and including the year 1886 for the name R. A. Marston, but said name is not contained in any of said directories.

CLARENCE H. SCRYMSER.

Sworn to before me this 10th day of June, 1889.

PHILIP G. BARTLETT,
*Notary Public, New York County.*

[SEAL.]

99 STATE OF NEW YORK, } ss:
*City and County of New York,* }

I, Edward F. Reilly, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Philip G. Bartlett, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 11 day of June, 1889.

[SEAL.] EDWARD T. REILLY, *Clerk.*

*Affidavit of Amos J. Holahan.*

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Amos J. Holahan, being duly sworn, says: I reside in New York city and am engaged in the business of stock broker in New York city. I have carefully examined the lists of members of the New York Stock Exchange and also of the Consolidated Stock and Petroleum Exchange of New York for the years from and including 1881 to and including 1886. The name R. A. Marston does not appear on any of said lists. I have been engaged in the stock-broker's business in said city for sixteen years and have never met nor heard of any person of the name of R. A. Marston.

AMOS J. HOLAHAN.

Sworn to before me this 10th day of June, 1889.

PHILIP G. BARTLETT,
[SEAL.] *Notary Public, New York County.*

STATE OF NEW YORK, } ss:
*City and County of New York,* }

I, Edward F. Reilly, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Philip G. Bartlett, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for gen-

eral purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 11 day of June, 1889.

[SEAL.] EDWARD F. REILLY, *Clerk.*

100 *Affidavit of J. S. Penniwell.*

In District Court, First Judicial District of Dakota Territory, in and for Lawrence County.

VICTOR DORNE
*vs.*
RICHMOND SILVER MINING COMPANY.

TERRITORY OF MONTANA,
*Deer Lodge County,* } *ss:*

J. S. Penniwell, of lawful age, being duly sworn, says he resides at Anaconda, Montana. During the years 1882 and 1883 he resided at Galena, Lawrence county, Dakota, and was there acquainted with Victor Dorne. Affiant was then a stockholder in the Richmond Silver Mining Company. Affiant further says that in the latter part of 1882 or early part of 1883 he united with J. W. Kyte in a sale of some stock in said Richmond Silver Mining Company through J. M. Mordock, of Geneva, Illinois, at ten cents a share; that Victor Dorne never, in 1883 or any other time, offered this affiant $1.00 a share or $2.00 a share or any other sum for Richmond Silver Mining Company stock, and affiant never asked him $3.00 or $4.00 a share or any other price for such stock, or had any talk with Victor Dorne regarding a sale to Dorne or purchase by Dorne of such stock in 1883 or at any other time.

J. S. PENNIWELL.

Subscribed and sworn to before me this 3rd day of June, 1889.

B. F. MAHAN,
[SEAL.] *Notary Public for Deer Lodge County, Montana Territory.*

*Affidavit of John Cranstoun.*

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE
*vs.*
RICHMOND SILVER MINING COMPANY.

TERRITORY OF WASHINGTON,
*County of King,* } *ss:*

John Cranstoun, of lawful age, being duly sworn, says he resides at Seattle, Washington Territory, and has resided there since about

the month of January, 1888; that prior thereto he resided in Lawrence county, Dakota Territory; that in 1882 and until some time in the spring of 1883 he was in the employ of the Homesteak Mining Company at Lead City and was then occupied a few weeks at Galena, and thence went to Carbonate camp, where he was in the employ of the Iron Hill Mining Company; that in the spring of 1886 he formed a copartnership with Neil McDonough in the stock business at Deadwood, but was at no time prior to that year engaged in the buying or selling of stock; that he is acquainted with the
101 plaintiff, Victor Dorne, but has no recollection of being acquainted with him prior to the fall or winter of 1886, when he made a trade with him or partly negotiated one through the telephone and afterwards met him in Koenigsberger's store for the first time to know him to affiant's recollection. The stock involved in the trade was that of a mine about which there was some trouble at Galena; there were conflicting claims that were afterwards consolidated and the name of the company changed to the Horseshoe Comet Mining Company to affiant's best recollection. I think W. L. McLaughlin was secretary of one of the corporations, either the "Horseshoe" before the consolidation or the "Horseshoe Comet" after the consolidation. I am not sure which. This was the first and only stock transaction affiant ever had with Dorne, and said Dorne never left any order with affiant for Richmond Silver Mining Company stock in 1883 or at any other time.

JOHN CRANSTOUN.

Subscribed and sworn to before me this 1st day of June, 1889.

FRANK HANFORD,
[SEAL.] *Notary Public for Wash. Terr'y.*

*Affidavit of Henry Earle.*

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

STATE OF NEW YORK,
*City and County of New York,* } *ss.:*

Henry Earle, being duly sworn, says: I asked R. I. Marston, mentioned in the former affidavit made by me herein and verified the 11th day of June, 1889, whether he knew any one by the name of Victor Dorne. Said Marston declared that he did not know any person of that name. I made the same inquiry of each of the other persons named Marston, with whom I had interviews. As related in my said former affidavit, each and every of said persons declared to me that he knew no one of the name of Victor Dorne.

HENRY EARLE.

Sworn to before me this 20th day of June, 1889.

PHILIP G. BARTLETT,
*Notary Public, New York County.*

STATE OF NEW YORK, }
*City and County of New York,* } *ss:*

I, Edward F. Reilly, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Philip G. Bartlett, before whom the annexed deposition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and
102 for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand — affixed the seal of the said court and county the 20 day of June, 1889.

EDWARD F. REILLY, *Clerk.*

And in due time the plaintiff served on the defendant the following counter-affidavits, properly entitled in the action:

*Affidavit of Victor Dorne.*

In District Court, First Judicial District of the Territory of Dakota, in and for the County of Lawrence.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant. } Affidavit of Victor Dorne.

TERRITORY OF DAKOTA, }
*County of Lawrence,* } *ss:*

Victor Dorne, the plaintiff in this case, being duly sworn, deposes and says: Concerning the man R. A. Marsden, mentioned in affiant's testimony in this case, the name is spelled Marsden instead of Marston, as given by the affidavits on behalf of the defendants in this case. Affiant first became acquainted with this gentleman in the city of Chicago, Illinois, in the early summer of 1883, and rode with him from Chicago to New York; his full name is Rudolph Anton Marsden. He is and was a mining operator and operator in mining stock, a well-educated man of foreign birth. He gave affiant to understand that he was a graduate of a Freiberg, Germany, university. Affiant and Mr. Marsden became quite well acquainted in the course of this trip, and the subject of the Richmond Mining Company's stock was discussed very freely between them. After affiant had arrived in New York he saw the said Marsden on several occasions. His business seemed to take him in various parts of the country, and affiant did not understand that he was a per-

manent resident of New York. Affiant, however, left him in that city when affiant returned to the West in the summer of 1883. While affiant was in New York at that time there was considerable interest in Richmond Silver Mining Company's property, and the said Marsden told affiant that he had an opportunity to sell 5,000 shares of the Richmond stock. Affiant then told him that he had at that time 3,500 shares, but would endeavor to buy another 1,500 shares after he had returned to the hills. After returning to the hills he received a communication from the said Marsden, enclosing the draft referred to in affiant's testimony, and the negotiations testified to by affiant in this case thereupon took place between the said Marsden and this affiant. When counsel for defendant requested plaintiff to endeavor to ascertain the present address of the said Marsden during the progress of this trial; affiant immediately telegraphed to an acquaintance of his, Mr. S. S. Stewart, of
103 52 White street, New York city, asking after the present whereabouts of the said R. A. Marsden, a copy of said telegram being in words and figures as follows, to wit:

"DEADWOOD, D. T., *April 11th*, 1889.

To S. S. Stewart, 52 White St., New York:

Please wire if you know the whereabouts of Mr. R. A. Marsden, with whom I had important business communications in June, 1883.

VICTOR DORNE."

And received from said Stewart on the 12th day of April, A. D. 1889, a telegraphic answer, of which the following is a copy:

"NEW YORK, *Apr.* 12, 1889.

To Victor Dorne, Deadwood, D. T.;

Don't know that address. Let us hear from you.

S. S. STEWART."

Affiant handed the said telegram to his attorneys in the case as soon as it was received. It was not given to the attorneys for the defendant, simply because it did not throw light upon the present whereabouts of the said Marsden, and affiant does not know where said Marsden now is, and has not been able to find his whereabouts since the trial of this case took place.

VICTOR DORNE.

Subscribed and sworn to before me this 16th day of August, A. D. 1889.

[SEAL.] EDWARD K. DEPUY,
*Notary Public.*

*Affidavit of S. S. Stewart.*

In District Court, First Judicial District of the Territory of Dakota in and for the County of Lawrence.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant.
} Affidavit of S. S. Stewart.

STATE OF NEW YORK,
*City and County of New York,* } *ss:*

S. S. Stewart, being duly sworn, deposes and says he resides in the city of New York, State of New York, at No. 283 West End avenue, and is a member of the firm of Campbell & Elliott, merchants, doing business at No. 52 White street, city of New York. He has resided in the said city of New York for the past fourteen years and has been well acquainted with Victor Dorne, the plaintiff in this case, for eleven years; that he met the said Dorne in the said city of New York during the summer of 1883 and prior and subsequent to that time; that this affiant is acquainted with several members of the New York stock exchange and is also acquainted with various persons who deal in mining stocks and other stocks and shares in the city of New York who are not members of the New York stock exchange. Affiant knows of his own knowledge that a large amount of mining-stock sales, business, and transfers is carried on constantly and was carried on in the year 1883 in the city of New York by persons not members of the said New York stock exchange. Affiant further says that it costs about thirty thousand dollars ($20,000 to 30,000.00) to acquire membership in the said New York stock exchange.

104

This affiant has frequently bought, sold, and dealt in such stocks with friends, but not as a business, and has never been a member of such exchange and is acquainted with many persons not members of the said New York stock exchange who were also buying, selling, and dealing in mining stock in the said city of New York in 1883, and have carried on such business in said city since that time.

S. S. STEWART.

Subscribed and sworn to before me this 10th day of August, A. D. 1889.

WILLIAM V. A. POE,
[SEAL.] *Notary Public, New York County, New York State.*

*Affidavit of W. W. Tobey.*

In District Court, First Judicial District of the Territory of Dakota in and for the County of Lawrence.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant. } Affidavit of W. W. Tobey.

STATE OF TEXAS, *County of Bexar,* } *ss:*

W. W. Tobey, being duly sworn, deposes and says he is now and — a resident of San Antonio, State of Texas, and resided in the city of New York, State of New York, in the year 1883. He is well acquainted with the plaintiff, Victor Dorne, and has known him for ten years last past; that he has frequently met the said Victor Dorne in the said city of New York, and met him in that city in the summer of 1883; that he remembers hearing the said Dorne mention to him in the summer of 1883 the name of one Marsden in connection with some mining property concerning which this affiant understood that the said Dorne was having some dealings with the said Marsden.

W. W. TOBEY.

Subscribed and sworn to before me this 1st day of August, A. D. 1889.

[SEAL.] JOS. W. MADDOX,
*Notary Public, Bexar County, Texas.*

*Affidavit of Wm. L. Stewart, Wm. F. Elliott, and Thos. J. Delaney.*

In District Court, First Judicial District of the Territory of Dakota in and for the County of Lawrence.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant.

105 STATE OF NEW YORK, *City and County of New York,* } *ss:*

Wm. L. Stewart, aged 46 years, by occupation stationer; Wm. F. Elliott, aged 67 years, by occupation broker, and Thos. J. Delaney, aged 29 years, by occupation broker, being duly sworn, each for himself, and not one for the other, deposes and says he is in business in the city of New York, State of New York, and has carried on business in the said city of New York for several years last past. He is acquainted with several members of the New York stock exchange and is also acquainted with many persons in the said city

of New York who are engaged in buying, selling, and dealing in mining stock and other stocks and shares, who are not members of the said N. Y. stock exchange. He knows of his own knowledge that a very large portion of the buying, selling, and dealing in mining stocks in said city is carried on by persons who are not members of the said New York stock exchange, and that a very large portion of such business was, during the year 1883, carried on by people of the said city of New York who were not members of the said New York stock exchange. Affiant further says that it costs about twenty thousand to thirty thousand dollars to acquire a membership in the said New York stock exchange.

WM. L. STEWART. [SEAL.]
WM. F. ELLIOTT. [SEAL.]
THOS. J. DELANEY. [SEAL.]

Subscribed and sworn to before me this 12th day of August, A. D. 1889.

FREDERICK KLOECKNER,
[SEAL.] (63) *Notary Public.*

And in due time thereafter the defendant served on the plaintiff, in support of its motion, the following rebutting affidavit properly entitled in the action:

*Affidavit of Amos J. Holahan.*

In the District Court, First Judicial District of the Territory of Dakota in and for Lawrence County.

VICTOR DORNE, Plaintiff,
*against*
THE RICHMOND SILVER MINING COMPANY, Defendant.

STATE OF NEW YORK,
*City and County of New York,* } *ss:*

Amos J. Holahan, being duly sworn, deposes and says that he is informed that the plaintiff in this action has made and served an affidavit, to be used upon the hearing of the motion for a new trial in this action, wherein said plaintiff, Victor Dorne, states that the R. A. Marsden concerning whom said Dorne testified on the trial heretofore had in this action was named Rudolph Anton Marsden and temporarily resided in New York city during the year 1883. This deponent has resided in New York city for twenty-five years. Ever since 1873 he has been engaged in business in said city
106 of New York as a stock broker and is and has been acquainted with all of the members of the New York stock exchange during that time, and has also known and knows a large number of business men and brokers in said city not members of said exchange. Deponent has never known nor heard of any person by the name of Rudolph Anton Marsden or R. A. Marsden. Deponent

has diligently and carefully searched the directory of the said city of New York for the years 1882, 1883, and 1884, and said directory does not contain the name Rudolph Anton Marsden nor the name R. A. Marsden nor any nearly similar name. Deponent is informed and believes that said directory contains a complete list of all the residents of said city and also of all persons who resides elsewhere, but have business offices in said city. Deponent has inquired of more than twelve brokers doing business in the city of New York—not members of the stock exchange, but who deal in unlisted securities—and none of them have ever known or heard of any one by the said name of Rudolph Anton Marsden or R. A. Marsden. Among the persons of whom deponent has made such inquiry are Jasper Edgerton and George Blankman, who have been engaged in the business of dealing in unlisted securities for upwards of twenty years. Deponent knows of no other source from which he could obtain information as to whether such a person as the Rudolph Anton Marsden deposed to in the said Dorne's affidavit ever resided in this said city of New York. Deponent further says that he has been informed concerning the testimony of the said Victor Dorne respecting the sale of certain shares of stock in the Richmond Silver Mining Company and of the draft sent to him therefor by the said Marsden or Marston, and that, from his intimate knowledge of the facts and circumstances, the deponent is positive that no such sale of stock in the said company was so made in good faith by said Dorne for the price testified to by him or anything near that price, and that if any such transaction took place it was collusive and made by the said Dorne and the said Marsden for the purpose of making evidence and with the purpose and intention of bringing this action, and that the draft concerning which said Dorne testified was not drawn by any reputable bank or banker or by any one with the intention or expectation that it would be paid.

AMOS J. HOLAHAN.

Sworn to before me this 28th day of August, 1889.

PHILIP G. BARTLETT,
*Notary Public, New York Co.*

[SEAL.]

STATE OF NEW YORK, }
*City and County of New York,* } *ss:*

I, Edward F. Reilly, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Philip G. Bartlett, before whom the annexed despo-ition was taken, was at the time of taking the same a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

107 In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 28 day of Aug., 1889.

EDWARD F. REILLY, *Clerk.*

And thereafter, within the time allowed by law and the order of court, the motion for new trial came on to be heard before the court, when the foregoing affidavits hereinbefore set forth were used, those served by defendant on its behalf and those served by plaintiff on his behalf, and reference was also made to the minutes of the court and other matters authorized by law, and, after hearing argument of counsel and consideration, the court made and entered the following:

*Order Overruling the Motion for New Trial.*

In District Court, First Judicial District of the Territory of Dakota in and for the County of Lawrence

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING CO., a Corporation, Defendant. } Order.

This cause coming on to be heard before the above-entitled court, at the court-house, in the city of Deadwood, Lawrence county, Dakota, on the 6th day of September, 1889, upon the motion of the defendant to vacate and set aside the verdict rendered by the jury in this case and the judgment rendered by the court thereon and for a new trial of this action, W. C. Kingsley, Esq., and Messrs. Van Cise & Wilson appearing as counsel for the defendant and Martin & Mason & Messrs. Moody & Washabaugh appearing as counsel for the plaintiff, and the court having heard the presentation and argument of the said motion and being fully advised in the premises, it is hereby—

Ordered and considered that the said motion be, and the same is hereby, overruled and denied; and it is further—

Ordered that the time for settling bill of exceptions be extended until November 11th, 1889, and that execution upon the judgment in this case be stayed during same period, but with leave to the plaintiff to apply for a vacation and setting aside of the said stay of execution at any time during said period upon proper showing of sufficient cause therefor.

Done in open court this 11th day of September, A. D. 1889.

By the court:

CHAS. M. THOMAS, *Judge.*

To which order and ruling of the court the defendant, by its counsel, duly excepted.

The foregoing contains all the evidence introduced upon the trial, the instructions given and refused, the motion for a new trial, the order overruling motion for new trial, and all affidavits and other

papers used by either party upon the hearing of the application therefor, and all other matters in any manner bearing upon
108 the objections and exceptions taken by the defendant or necessary to present or explain them or either of them.

And forasmuch as the foregoing matters do not now appear of record in this action and the defendant is desirous of preserving them by a bill of exceptions, this bill is now within the time fixed by law and the order of this court hereby certified and allowed by me as a true, full, and correct bill of exceptions in this action.

In witness whereof I have hereunto set my hand this 28th day of September, A. D. 1889.

CHAS. M. THOMAS, *Judge.*

109 "In District Court, First Judicial District of the Territory of Dakota, in and for the County of Lawrence.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant.

We, the jury in the above-entitled case, find for the plaintiff on all the issues and assess the plaintiff's damages at ($—) $15,315.70 *dollars.*

H. P. CHEAIRS, *Foreman.*

Deadwood, Dakota, April 13th, 1889."

(On margin:) Given.

(Endorsed:) Filed April 13, 1889. W. H. Jones, clerk.

In District Court, First Judicial District of the Territory of Dakota, in and for the County of Lawrence.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant. } Judgment.

The issues in this case having been brought on regularly for trial before the above-entitled court, at the court-house, in the city of Deadwood, Lawrence county, Dakota, and a jury duly and regularly empanelled, and the said cause having been regularly tried on the 10th, 11th, 12th, and 13th days of April, A. D. 1889, the said trial being begun on April 10th and concluded on April 13th, 1889, said plaintiff appearing in person and by his attorneys, Moody & Washabaugh and Martin & Mason, and the defendant ap-
110 pearing by its attorneys, W. C. Kingsley, Esq., and Messrs. Van Cise & Wilson, and the said parties having respect-ly introduced their proof, and a verdict for the plaintiff and against the defendant on all the issues and assessing plaintiff's damage at fifteen thousand three hundred and fifteen dollars and seventy cents having been duly rendered on the 13th day of April, 1889:

Now, therefore, on motion of plaintiff's counsel it is hereby—

Ordered and adjudged that the said plaintiff, Victor Dorne, have and recover of the defendant, The Richmond Silver Mining Company, the sum of fifteen thousand three hundred and fifteen dollars and seventy cents, damages, the amount found and assessed by the jury, together with his costs and disbursements in the sum of sixty and $\frac{5}{100}$ dollars, to be taxed and inserted herein, and that execution issue accordingly.

Done in open court this 15th day of April, A. D. 1889.

By the court:

CHAS. M. THOMAS, *Judge.*

(Endorsed:) In district court, Lawrence county. Victor Dorne *vs.* Richmond Silver Mining Co. Judgment. Filed April 15th, 1889. W. H. Jones, clerk. Moody & Washabaugh, Martin & Mason, att'ys for pl'ff.

111 In the District Court, First Judicial District of Dakota Territory, in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

I, Charles M. Thomas, presiding judge of the above-named district and the judge before whom the above-entitled action was tried, do hereby certify that the within and foregoing papers, to wit, summons, amended complaint, answer, verdict, judgment, and bill of exceptions as settled and certified by me, are contained in and constitute the judgment-roll and the whole of such judgment-roll in the above-entitled action.

In witness whereof I have hereunto set my hand this 28th day of September, A. D. 1889.

CHAS. M. THOMAS,
*Judge & Associate Justice Sup. Court.*

(Endorsed:) Victor Dorne *v.* Richmond Silver Mining Company. Judge's certificate. Filed this 28th day of Sep., A. D. 1889. W. H. Jones, clerk of district court, Lawrence Co., Dakota, by Louis Caulfield, deputy.

In the District Court, First Judicial District of Dakota Territory, in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.
Stipulation and Order.

112 In the above-entitled action it is hereby stipulated by and between the parties thereto, by their respective counsel, that the copy of motion for new trial, copies of affidavits used

upon the hearing of such motion, and copy of the order of court overruling and denying the motion, as such copies are set forth in the bill of exceptions settled and certified in this action, shall be used in the hearing upon appeal from the order overruling the motion for a new trial in the supreme court of the Territory or State or for review in any other court, and this court may direct the same to be sent and serve as copies in lieu of the orignal motion, affidavits, and order now on file in this court, to have the same effect as such originals.

Deadwood, Dak., Sept. 28, 1889.

MOODY & WASHABAUGH,
MARTIN & MASON,
*Attorneys for Pl'ff.*
W. C. KINGSLEY,
VAN CISE & WILSON,
*Att'ys for Def't.*

On reading and filing the within stipulation it is ordered that copy of motion for new trial, copies of affidavits used upon the hearing of such motion, and copy of the order of the court overruling and denying the motion, as such copies are set forth in the bill of exceptions settled and certified in this action, be sent by the court, in lieu of the originals now on file in this court, to the supreme court upon appeal from the order overruling and denying the motion for a new trial for use in said supreme court or in any court of appeal or review to which this cause may be taken or reviewed.

Done this 28 day of September, 1889.

By the court:

CHARLES M. THOMAS, *Judge.*

113 (Endorsed:) Victor Dorne *v.* Richmond Silver Mining Co. Stipulation and order. Filed this 28th day of Sept., A. D. 1889. W. H. Jones, clerk of the district court, Lawrence Co., Dakota, by Louis Caulfield, dep-ty.

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't. } Notice of Appeal.

Please take notice that the defendant, The Richmond Silver Mining Company, in the above-entitled action appeals from the judgment entered therein on the 15th day of April, 1889, in favor of the plaintiff and against the defendant for the sum of fifteen thousand three hundred and fifteen dollars and seventy cents, damages, and sixty dollars and five cents, costs, in all the sum of fifteen thousand three hundred and seventy-five dollars and seventy-five cents, and from the whole of the said judgment to the supreme court of the Territory of Dakota.

You will also take notice that the said defendant appeals from the order of the court made and entered in said action on the 11th day of September, 1889, overruling and denying the motion and application of the defendant to vacate and set aside the verdict returned by the jury in this action and the judgment rendered by the court thereon and for a new trial of the action and from the
114 whole of said order of the court to the supreme court of the Territory.

Dated Deadwood, Dakota Territory, October 8th, A. D. 1889.

W. C. KINGSLEY,
VAN CISE & WILSON,
*Att'ys for Def't.*

To Messrs. Martin & Mason and Moody & Washabaugh, att'ys for pl'ff.

To W. H. Jones, Esq., clerk of the district court in and for Lawrence county.

(Endorsed:) In dist. court in & for Lawrence Co. Victor Dorne, pl'ff, *vs.* The Richmond Silver Mining Co., def't. Notice of appeal. Services admitted by copy at Deadwood, Dakota, October 8, 1889. Martin & Mason, Moody & Washabaugh, att'ys for plaintiff. W. H. Jones, clerk dist. court, by Louis Caulfield, d'p'y. Filed this 8th day of October, A. D. 1889. W. H. Jones, clerk dist. court, by Louis Caulfield, d'p'y.

115 (*Undertaking on Appeal, Supreme Court.*)

TERRITORY OF DAKOTA, } *ss:*
*First Judicial District,* }

In the District Court within and for Lawrence County.

VICTOR DORNE, Pl'ff & Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't & Appellant.

Whereas on the 15th day of April, 1889, in the district court within and for the county of Lawrence, the above-named respondent recovered a judgment against the above-named appellant for fifteen thousand three hundred and fifteen dollars and seventy cents ($15,315.70) and sixty dollars & $\frac{5}{100}$ ($60.05) costs, in all $15,375.75;

And the above-named appellant, feeling aggrieved hereby, intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal or on a dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from or in any part thereof be affirmed or said appeal de dismissed the said appellant will pay the amount directed to be

paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

Dated October 7, 1889.

RICHMOND SILVER MINING COMPANY,
By W. C. KINGSLEY &
VAN CISE & WILSON, *Their Att'ys.*
SOL. STAR.
J. DEETKEN.
ENOS LANE.
D. A. McPHERSON.

116 TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

On this 7th day of October, A. D. 1889, before me, the subscribed, appeared Sol. Star, J. Deetken, & Enos Lane, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

[SEAL.] JOHN R. JONES,
*Notary Public.*

*Acknowledgment.*

TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

Be it remembered that on this 8th day of October, in the year one thousand eight hundred and eighty-nine, before me, John R. Jones, a notary public within and for said county and Territory, personally appeared D. A. McPherson, well known to me to be the person who is described in and who executed the within and foregoing instrument, and severally duly acknowleged to me that he executed the same freely.

In witness whereof I have hereunto set my hand and official seal, at said county, the day and year above written.

[SEAL.] JOHN R. JONES,
*Notary Public.*

(On back.)

TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

Sol. Star, J. Deetken, Enos Lane, & D. A. McPherson, being severally sworn, each for himself says: The said Sol. Star and J. Deetkin each says he is a resident and freeholder of the county
117 of Lawrence, in this Territory, and that he is worth the sum of $10,000.00 over and above all his debts and liabilities and

exclusive of all property exempt from levy and sale on execution; and the said Enos Lane and D. A. McPherson each for himself says that he is a resident and freeholder of the county of Lawrence, in this Territory, and that he is worth the sum of $10,000 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

SOL. STAR.
J. DEETKEN.
ENOS LANE.
D. A. McPHERSON.

Subscribed and sworn to before me by Sol. Star, J. Deetken, and Enos Lane this 7th day of October, 1889.

JOHN R. JONES,
[SEAL.] *Notary Public.*

Subscribed and sworn to before — by D. A. McPherson this 8th day of October, 1889.

JOHN R. JONES,
[SEAL.] *Notary Public.*

Residence and address of sureties:
Sol. Star, Deadwood, Lawrence Co., Dakota.
J. Deetken, Deadwood, Lawrence Co., Dakota.
D. A. McPherson, Deadwood, Lawrence Co., Dakota.
Enos Lane, Whitewood, Lawrence Co., Dakota.

(Endorsed:) Territory of Dakota, county of Lawrence. In district court. Victor Dorne *v.* Richmond Silver Mining Company. Undertaking on appeal to supreme court. Service admitted by copy, at Deadwood, Dak., October 8, 1889. Moody & Washabaugh, Martin & Mason, att'ys for plaintiff. Filed this 8th day of October, A. D. 1889. W. H. Jones, clerk dist. court, by Louis Caulfield, d'p'y.

118 In the District Court, First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

I, W. H. Jones, clerk of the above-entitled court, do hereby certify that the within and annexed papers constituting the judgment-roll in this action are the original papers constituting the same, together with the original certificate of the judge thereto, and that the original application for new trial, affidavits used upon the hearing thereof, and order of the court overruling and denying said application are held here and copies thereof sent in lieu of the originals pursuant to a stipulation of counsel and order of the court, a true copy of which also appears in the foregoing *appears;* and I further certify that the copies of application for new trial, affidavits used

upon the hearing thereof, and order of the court overruling and denying the same, as the same appear in the bill of exceptions in the judgment-roll, are true, full, and correct copies of the originals of said papers now on file in this office. I further certify that the annexed notice of appeal and undertaking are the original notice of appeal and undertaking given thereon in this action as the same were served and filed in this office, and the annexed papers are now transmitted to the supreme court of the Territory pursuant to such appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 8th day of October, A. D. 1889.

[SEAL.] W. H. JONES,
*Clerk of the District Court,*
By LOUIS CAULFIELD, *D'p'y.*

119 (Endorsed on outside cover:) No. 2, A. Victor Dorne *vs.* Richmond Silver Mining Company, a corporation. Judgment-roll. Filed March 17th, 1890. Thos. P. Fenlon, Jr., clerk supreme court of the Territory of Dakota. Filed October 8, 1889. J. H. C. Young, clerk.

120 In the Supreme Court of Dakota Territory, October Term, 1889.

VICTOR DORNE, Pl'ff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't and Appellant.

*Assignment of Errors.*

The defendant and appellant says there is manifest error upon the face of the record in this action, in this:

I.

The court erred in overruling defendant's objection to direct interrogatory No. 91 put to the witness Victor Dorne when examined on behalf of the plaintiff and allowing the witness to answer the same.

II.

The court erred in overruling the objection of defendant to questions 93 and 94 in the direct examination of said witness and in allowing said witness, against those objections, in answer to said questions and the questions following, to state the witness's understanding of the object and purpose of the conveyance to Scrymser, and his opinion that it was to be conveyed to Scrymser for the benefit of defendant.

III.

The court erred in overruling defendant's objection to the offer in evidence of the letter from plaintiff to C. H. Scrymser, dated

March 5, 1883, and introduced in connection with direct interrogatory No. 104 addressed to said witness and in admitting said letter in evidence against defendant's objection.

121 IV.

The court erred in overruling defendant's objection to direct interrogatory No. 112 addressed to said witness and allowing said witness in answer thereto to testify what interest the incorporators had in the defendant company.

V.

The court erred in overruling the objection of defendant to direct interrogatory No. 149 addressed to this witness and allowing the witness to answer the same and other like questions without showing that he was qualified or competent to make an answer thereto, and in allowing defendant to answer other like questions, Nos. 142, 143, 147, and others, and to testify to the market value of stock in the defendant company in Deadwood, where the same witness testified there was none of the stock for sale or on the market.

VI.

The court erred in allowing this witness, upon his being recalled on behalf of plaintiff, to testify, in spite of defendant's prior objections to like questions, to the value of stock in the defendant company in New York (see question 27) and in Deadwood based upon its alleged value in New York and the cost of getting it to Deadwood. (See question 9 and questions following upon the recall of this witness.)

VII.

The court erred in allowing this witness to testify to an alleged contract for sale of stock to parties in New York (see questions No. 11 and following upon the recall of the witness) after having previously limited the testimony of value to the time when the
122 stock should reach the defendant and directing witness not to testify as to offers he had made for stock or prices at which it had been refused him or any individual instances. (See question 6 and ruling immediately preceding.)

VIII.

The court erred in sustaining the objection of plaintiff and excluding from the deposition of C. H. Scrymser, introduced on behalf of defendant, the question, "At whose instance did you go to Deadwood on that occasion?"

IX.

The court erred in sustaining the plaintiff's objection and excluding from said deposition the following question, offered on behalf of the defendant: "In what condition is that property today as compared with its condition when you received it from Mr. Dorne?

Has any ore been taken from it—the Richmond and Eureka companies I am speaking of?"

X.

The court erred in sustaining plaintiff's objection and excluding from said deposition, when offered on behalf of defendant, the following question: "Has its value been diminished in any way?"

XI.

The court erred in sustaining the objection of the plaintiff and excluding from the said deposition, when so offered, the following question: "Is it worth as much today as it ever was?"

XII.

The court erred in overruling the motion of the defendant to strike out all the evidence of Victor Dorne, the plaintiff in
123 this action, relating to the alleged negotiations or attempted negotiations for the sale of 5,000 shares of stock of the Richmond Silver Mining Company with a party in New York, and also the alleged offers to buy stock in this market, with orders at a dollar a share, for the purpose of making such alleged sale or negotiation for sale.

XIII.

The court erred in sustaining plaintiff's motion to strike out the answer of the witness John M. Mordock to question No. 12 and in the court's interrogatory put in connection therewith, and also in limiting said witness's answers by its direction in connection with interrogatory No. 13.

XIV.

The court erred in sustaining the objection of plaintiff to question No. 25 addressed to said witness, John M. Mordock.

XV.

The court erred in sustaining the objection of plaintiff to question No. 27 addressed to said last-named witness.

XVI.

The court erred in overruling and denying the motion made by defendant at the close of the testimony that the court, upon all the evidence in the case, should direct a verdict for the defendant for the reason that the evidence was grossly insufficient to justify a verdict for plaintiff in these particulars:

1. The allegations of the cause of action to which the proof
124 was directed were unproved not in some particular or particulars only, but in their entire scope and meaning, to wit: A cause of action was alleged against the defendant upon an agreement to deliver a certain number of shares of stock in exchange for real property, whereas the proof was directed to and showed a

contract made with one C. H. Scrymser for the delivery of shares of stock in exchange for said real property purchased in his name and upon his own responsibility, and the shares of stock to be exchanged for which were to be fixed and determined by him, and, if not satisfactory to plaintiff, he was to have a reconveyance of his property.

2. There was no evidence whatever that the said C. H. Scrymser was authorized to act in making the contract with plaintiff for or on behalf of defendant, or that he did so act or assume to act for defendant or as its agent in any manner whatever in making such contract with plaintiff.

3. There is no evidence that the contract made by Scrymser with the plaintiff, as attempted to be proven, was ever submitted to the defendant or its terms communicated to defendant.

4. There is no evidence that defendant ever ratified or assumed in any manner any contract made between Scrymser and the plaintiff with knowledge of the facts concerning the same.

5. It nowhere appears that the plaintiff ever exercised the option reserved to himself in the agreement with Scrymser or declared whether he would keep the 3,500 shares of stock sent him by Scrymser as compensation for the interests he conveyed or asked a reconveyance to him of such interests, nor does it appear that he
125 ever notified Scrymser or the defendant of his exercise of such option or demanded a reconveyance of the interests conveyed by him to Scrymser.

6. It nowhere appears that a definite contract was made between plaintiff and Scrymser for any number of shares, but only that Scrymser was to procure him an equitable and fair amount of the stock, to be fixed by him after returning to New York, and it does not appear that the amount fixed by Scrymser, to wit, 3,500 shares, was in any way inequitable or unfair to the plaintiff.

7. It does not appear that the plaintiff ever offered to return the stock to the defendant or to Scrymser or in any manner communicated to the company his dissatisfaction with the amount awarded him; on the contrary, he kept the stock and, by his own testimony, tried to make a contract in the spring or summer of 1883, within a few months after receiving it, for a sale of the stock to a party in New York.

8. The acts and conduct of the plaintiff in keeping the stock, making no offer to return it, failing to notify the defendant of dissatisfaction with the amount awarded him, making no demand upon it for a reconveyance of the interests described in his deed to Scrymser, subsequently selling the stock received, constitute an acquiescence on his part in the award made him and the amount of shares sent to him in exchange for his deed.

9. There is no legal evidence of damages to justify or sustain the verdict.

10. The weight and preponderance of the evidence is clearly in favor of the defendant and against the plaintiff and against the verdict rendered in this case.

126 11. And for other reasons.

XVII.

The court erred in refusing the instruction offered on behalf of the defendant, No. 7.

XVIII.

The court erred in refusing the instruction offered on behalf of the defendant, No. 8.

XIX.

The court erred in refusing the instruction offered on behalf of the defendant, No. 9.

XX.

The court erred in refusing the instruction offered on behalf of the defendant, No. 10.

XXI.

The court erred in giving, at the request of plaintiff, his instruction No. 3.

XXII.

The court erred in giving, at the request of plaintiff, his instruction No. 5.

XXIII.

The court erred in giving, at the request of plaintiff, his instruction No. 6.

XXIV.

The court erred in giving, at the request of plaintiff, his instruction No. 7.

XXV.

The court erred in giving, at the request of plaintiff, his instruction No. 8.

XXVI.

127 The court erred in giving, at the request of plaintiff, a form of verdict for the plaintiff.

XXVII.

Instruction numbered 3, given at request of plaintiff, is in conflict with instructions numbered 1 and 2, given for defendant.

XXVIII.

Instruction numbered 5, given for plaintiff, is in conflict with instruction numbered 1, given for defendant.

XXIX.

Instruction numbered 6, given for plaintiff, is in conflict with instruction numbered 3, given for defendant.

XXX.

Instruction numbered 6, given on behalf of plaintiff, is in conflict with instruction numbered 5, given for defendant.

XXXI.

The instructions given for plaintiff, numbered 3, 5, and 6, are confused and in conflict with instructions given on behalf of the defendant and with the charge of the court.

XXXII.

The court erred in its oral charge to the jury upon the question of ratification, in the second sentence thereof, from the words "but, if you believe," to and including the words "directly with it."

XXXIII.

The court erred in entering judgment upon the verdict returned for the plaintiff.

XXXIV.

128 The court erred in sustaining the plaintiff's objection to the use of the affidavit of jurors Edgar L. Winn and others and excluding said affidavit from consideration upon the hearing of the motion for new trial.

XXXV.

The court erred in overruling and denying the defendant's motion to vacate and set aside the verdict and judgment rendered herein and grant a new trial of the action, because, for the reason stated in said motion, the same ought to have been granted and said verdict and judgment set aside and a new trial ordered.

Wherefore for the errors aforesaid the undersigned respectfully pray for a reversal of the decision in this action.

Deadwood, D. T., October 8, 1889.

W. C. KINGSLEY,
VAN CISE & WILSON,
*Attorneys for Def't & Appellant.*

(Endorsed on cover the following:) No. 2 A 16. In the supreme court of Dakota Ty. Victor Dorne *vs.* The Richmond Silver Mining Company. Assignment of errors. Supreme court of the Territory of Dakota. Filed Oct. 8, 1889. J. H. C. Young, clerk. Filed March 17, 1890. Thos. P. Fenlon, Jr., clerk.

129 In the Supreme Court, State of South Dakota.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant. } Notice of Motion.

Please take notice that upon the affidavit herewith served upon you and upon the proceedings and record in this case the undersigned will move the above-entitled supreme court of the State of South Dakota, at its next term, to be holden at Pierre, the capital of the said State of South Dakota, on Tuesday, the 4th day of February, 1890, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal in this case for want of prosecution and for an affirmance of the judgment rendered in the district court of Lawrence county, Territory of Dakota, in this case on April 15th, 1889, and for such other and further relief as may be just.

MOODY & WASHABAUGH AND
MARTIN & MASON,
*Attorneys for Plaintiff.*

To the above-named defendant and to Messrs. Van Cise & Wilson and W. C. Kingsley, Esq., his attorneys.

130 In the Supreme Court, State of Soutlr Dakota.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation, Defendant. } Affidavit.

STATE OF SOUTH DAKOTA, } *ss:*
*County of Lawrence,* }

Eben W. Martin, being duly sworn, deposes and says: He is a member of the firm of Martin & Mason, practicing law at Deadwood, Lawrence county, South Dakota, and is one of the attorneys for the plaintiff, Victor Dorne, in the aboye-entitled action; that on the 15th day of April, 1889, judgment was recovered and entered in the district court of Lawrence county, Dakota, in favor of the plaintiff and against the defendant, in the sum of fifteen thousand three hundred and seventy-five dollars and seventy-five cents ($15,375.75), a copy of which judgment is hereto attached, marked Exhibit "A," and made a part of this affidavit; that on the 8th day of October, 1889, the attorneys for the defendant served on the attorneys for the plaintiff their notice of appeal in said case to the supreme court of the Territory of Dakota, a copy of which notice of appeal is hereto attached, marked Exhibit "B," and made a part of this affidavit, and at the same time, October 8th, 1889, the attorneys for the defendant served upon the attorneys for the plaintiff a copy of their undertaking upon appeal in this case, a copy of which is hereto

attached, marked Exhibit "C," and made a part of this affidavit; that, so far as the attorneys for the plaintiff are informed, no further steps have been taken by the defendant or its counsel
131 towards perfecting or prosecuting the appeal in this case; that counsel for the plaintiff and respondent has not been served with a copy of the abridgement or abstract of the record in this case, nor have they been served with a copy of appellant's brief in this case, and that, so far as counsel for respondent are informed, no abridgement or abstract of the record and no brief have been prepared on behalf of the defendant and appellant in this case.

EBEN W. MARTIN.

Subscribed and sworn to before me this 23rd day of January, A. D. 1890.

EDWARD K. DE PUY,
*Notary Public.*

[SEAL.]

132 EXHIBIT "A."

In District Court, First Judicial District, of the Territory of Dakota in and for the County of Lawrence.

VICTOR DORNE, Plaintiff,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant. } Judgment.

The issues in this case having been brought on regularly for trial before the above-entitled court at the court-house, in the city of Deadwood, Lawrence county, Dakota, and a jury duly and regularly empanelled, and the said cause having been regularly tried on the 10th, 11th, 12th, and 13th days of April, A. D. 1889, the said trial being begun on April 10th and concluded on April 13th, 1889, said plaintiff appearing in person and by his attorneys, Moody and Washabaugh and Martin & Mason, and the defendant appearing by its attorneys, W. C. Kingsley, Esq., and Messrs. Van Cise & Wilson, and the said parties having respectfully introduced their proof, and a verdict for the plaintiff and against the defendant on all the issues, and assessing plaintiff's damages at fifteen thousand three hundred and fifteen dollars and seventy cents, having been duly rendered on the 13th of April, 1889:

Now, therefore, on motion of plaintiff's counsel, it is hereby—

Ordered and adjudged that the said plaintiff, Victor Dorne, have and recover of the defendant, The Richmond Silver Mining Company, the sum of fifteen thousand three hundred and fifteen dollars and seventy cents damages, the amount found and assessed
133 by the jury, together with his costs and disbursements in the sum of sixty and $\frac{5}{100}$ dollars, to be taxed and inserted herein and that execution issue accordingly.

Done in open court this 15th day of April, A. D. 1889.

By the court:

CHAS. M. THOMAS, *Judge.*

EXHIBIT "B."

In the District Court of the First Judicial District of Dakota Territory in and for Lawrence County.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't. } Notice of Appeal.

Please take notice that the defendant, The Richmond Silver Mining Company, in the above-entitled action appeals from the judgment entered therein on the 15th day of April, 1889, in favor of the plaintiff and against the defendant for the sum of fifteen thousand three hundred and fifteen dollars and seventy cents damages and sixty dollars and five cents costs—in all, the sum of fifteen thousand three hundred and seventy-five dollars and seventy-five cents—and from the whole of the said judgment, to the supreme court of the Territory of Dakota.

You will also take notice that the defendant appeals from the order of the court, made and entered in said action on the
134 11th day of September, 1889, overruling and denying the motion and application of the defendant to vacate and set aside the verdict returned by the jury and the judgment rendered by the court thereon and for a new trial of the action, and from the whole of said order of the court, to the supreme court of the Territory.

Dated Deadwood, Dakota Territory, October 8th, A. D. 1889.

W. C. KINGSLEY,
VAN CISE & WILSON,
*Att'ys for Def't.*

To Messrs. Martin & Mason and Moody & Washabaugh, att'ys for pl'ff.

To W. H. Jones, Esq., clerk of the district court in and for Lawrence county.

EXHIBIT "C."

TERRITORY OF DAKOTA, } *ss:*
*First Judicial District,* }

In the District Court within and for Lawrence County.

VICTOR DORNE, Pl'ff & Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't & Appellant. }

Whereas, on the 15th day of April, 1889, in the district court within and for the county of Lawrence, the above-named respondent recovered a judgment against the above-named appellant for fifteen thousand three hundred and fifteen dollars and seventy cents ($15,315.70) and sixty dollars and $\frac{5}{100}$ ($60.05) costs—in all, $15,375.75,—

And the above-named appellant, feeling aggrieved hereby, intend- to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said
135 appellant will pay all costs and damages which may be awarded against it on said appeal or on a dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from or any part thereof be affirmed or said appeals be dismissed the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

Dated October 7th, 1889.

SOL. STAR.
J. DEETKEN.
ENOS LANE.
D. A. McPHERSON.

RICHMOND SILVER MINING COMPANY,
By W. C. KINGSLEY &
VAN CISE & WILSON, *Their Att'ys.*

TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

On this 7th day of October, A. D. 1889, before me, the subscriber, appeared Sol. Star, J. Deetken, and Enos Lane, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

JOHN R. JONES,
[SEAL.] *Notary Public.*

TERRITORY OF DAKOTA, } ss:
*County of Lawrence,* }

Be it remembered that on this 8th day of October, in the year one thousand eight hundred and eighty-nine, before me, John R. Jones, a notary public within and for said county and Terri-
136 tory, personally appeared D. A. McPherson, well known to me to be the person who is described in and who executed the within and foregoing instrument, and severally duly acknowledged to me that he executed the same freely.

In witness whereof I have hereunto set my hand and official seal, at said county, the day and year above written.

[SEAL.] JOHN R. JONES,
*Notary Public.*

TERRITORY OF DAKOTA, } ss:
*Lawrence County,* }

Sol. Star, J. Deetken, Enos Lane, and D. A. McPherson, being severally sworn, each for himself says: The said Sol. Star and J. Deetken each says he is a resident and freeholder of the county of Lawrence, in this Territory, and that he is worth the sum of $10,000 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and that the said Enos Lane and D. A. McPherson each for himself says: He is a resident and freeholder of the county of Lawrence, in this Territory, and that he is worth the sum of $10,000 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

SOL. STAR.
J. DEETKEN.
ENOS LANE.
D. A. McPHERSON.

[SEAL.] Subscribed and sworn to before — by Sol. Star, J. Deetken, and Enos Lane this 7th day of October, 1889.

JOHN R. JONES,
*Notary Public.*

[SEAL.] Subscribed and sworn to before me by D. A. McPherson this 8th day of October, 1889.

JOHN R. JONES,
*Notary Public.*

137 Residence and address of sureties:

Sol. Star, Deadwood, Lawrence county, Dakota.
J. Deetken, Deadwood, Lawrence county, Dakota.
D. A. McPherson, Deadwood, Lawrence county, Dakota.
Enos Lane, Whitewood, Lawrence county, Dakota.

(Endorsed:) Territory of Dakota, county of Lawrence: In district court. Victor Dorne vs. Richmond Silver Mining Co. Undertaking on appeal to Supreme Court.

138 In the Supreme Court of the State of South Dakota.

VICTOR DORNE, Pl't'ff and Resp'd't,
*vs.*
THE RICHMOND SILVER MINING COMPANY, Def't and App't.

Take notice that upon the annexed petition and the files, records, and proceedings in this cause The Richmond Silver Mining Company, the above-named defendant, will apply to the supreme court of this State at its next term, to be holden at Pierre, the capital of the State, on Tuesday, the 4th day of February next, at the opening of court on that day, or so soon thereafter as counsel can be heard, for an order transferring the above-entitled cause and all the files,

records, and proceedings relating thereto to the circuit court of the United States for the district of South Dakota, to the end that the same may be therein proceeded with according to law.

VAN CISE & WILSON,
*Att'ys for Def't.*

To Messrs. Martin & Mason and Moody & Washabaugh, att'ys for pl'ff.

139 In the Supreme Court of the State of South Dakota.

VICTOR DORNE, Pl't'ff and Resp'd't,
*vs.*
THE RICHMOND SILVER MINING COMPANY, Def't and App't.

To the honorable the supreme court of the State of South Dakota:

The petition and request of the Richmond Silver Mining Company respectfully shows—

That it is the defendant in the above-entitled action and is a corporation created by the laws of the State of New York and was at the time of the commencement of this action and still is the owner of property and engaged in transacting business under its charter of incorporation in that part of the late Territory of Dakota which now forms the State of South Dakota.

That this action arose within the limits of this State and was begun in the district court of the first judicial district of Dakota Territory in and for Lawrence county on the 29th day of October, 1883, by the service of the summons upon the defendant.

That said action proceeded to issue, trial, and judgment against defendant in said district court, and at the time of the admission of the State of South Dakota into the Union was duly pending in the supreme court of said Territory upon appeal from said district court.

That said action is a suit of a civil nature at common law, having been brought for the recovery of damages alleged to have
140 been sustained by reason of a breach of contract, and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum of five hundred dollars, to wit, the sum of over ten thousand dollars.

That your petitioner was at the time of the bringing of this suit and still is a citizen of the State of New York, and that the said plaintiff was then a citizen of that portion of the Territory of Dakota which is now the State of South Dakota, and still is a citizen of South Dakota, and that the controversy in said action was and is wholly between the said plaintiff and defendant.

Wherefore, inasmuch as by reason of the facts above stated this action is one whereof the circuit court of the United States for the district of South Dakota established by the act providing for the admission of South Dakota into the Union, approved March 22nd, 1889, might have had jurisdiction under the laws of the United States had such court existed at the time of commencement thereof,

your petitioner requests that this action and all the files, records, and proceedings relating thereto may be transferred to such circuit, court, to be proceeded with therein in due course of law.

VAN CISE & WILSON,
*Attorneys for the Petitioner.*

STATE OF SOUTH DAKOTA, } ss:
*County of Lawrence,* }

I, John R. Wilson, being duly sworn, do depose and say that I am a member of the firm of Van Cise & Wilson, attorneys for
141 the petitioner in the above-entitled action; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

JOHN R. WILSON.

Subscribed by the said John R. Wilson in my presence and by him sworn to before me this 21st day of January, A. D. 1890.

[SEAL.] FRANK McLAUGHLIN,
*Notary Public.*

(On back:) In supreme court. Victor Dorne *vs.* The Richmond Silver Mining Company. Motion to transfer cause. Due service by copy admitted this 23rd day of January, 1890. Martin & Mason, attorneys for pl'ff & resp't. No. 2 A 16. Supreme court, State of South Dakota. Filed Feb'y 4, 1890. I. W. Goodner, clerk. Filed March 17th, 1890. Thos. P. Fenlon, Jr., clerk.

142 In Supreme Court, State of South Dakota.

VICTOR DORNE, Plaintiff and Resp't,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't & App'l't.

Now comes plaintiff and respondent, Victor Dorne, by his counsel, Martin & Mason and Moody & Washabaugh, and resists the motion and application of the defendant and appellant to transfer this cause to the circuit court of the United States upon the following grounds:

1st. The petition for such transfer does not upon its face show that the said cause is one transferrable to said circuit court, or that said cause is of a Federal character.

2nd. No bond or other indemnity is served or filed with said petition.

VICTOR DORNE,
*Pl'ff & Resp'd't.*
MARTIN & MASON AND
MOODY & WASHABAUGH,
*Att'ys for Pl'ff & Resp'd't.*

(On back:) In supreme court. Victor Dorne, pl'ff & resp'd't, *vs.* Richmond Silver Mining Company, def't & app'l't. Supreme court, State of South Dakota. Filed Feb'y 4, 1890. I. W. Goodner, clerk.

143 (File No. 16.)

STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant. } February Term, A. D. 1890.

Appeal from the district court of Lawrence county.

The motion of appellant to transfer this cause to the circuit court of the United States, district of South Dakota, came on to be heard at the February, 1890, term of this court, at the supreme court room, in the city of Pierre, State of South Dakota.

Present: Dighton Corson, presiding judge, and A. G. Kellam and John E. Bennett, judges.

And the said motion having been argued by Edwin Van Cise, Esq., attorney for appellant, and Eben W. Martin, Esq., attorney for respondent, and the court being fully advised in the premises,

It is now by the court ordered that said motion be, and the same is hereby, granted and allowed.

Done in open court this first day of March, 1890.

By the court:

D. CORSON,
*Presiding Judge.*

(On back:) (File No. 16.) State of South Dakota. In supreme court, February term, 1890. Victor Dorne, plaintiff and resp't, *vs.* Richmond Silver Mining Company, defendant and app't. Filed in open court this 1st day of March, 1890. I. W. Goodner, clerk. Remittitur sent down ——, 189–.

144 STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.

I, Van W. Goodner, clerk of the supreme court in and for the State of South Dakota, hereby certify that the foregoing is a full, true, and correct copy of the order of March 1st, 1890, in the above-entitled cause as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this twelfth day of March, A. D. 1890.

IVAN W. GOODNER,
[SEAL.] *Clerk of the Supreme Court.*

145 STATE OF SOUTH DAKOTA:

Supreme Court.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.

I, Ivan W. Goodner, clerk of the supreme court within and for the State of South Dakota, do hereby certify that the within and annexed papers, to wit, the judgment-roll, under certificate of the clerk of the district court in and for Lawrence county, D. T.; the assignment of errors, the notice of motion to dismiss appeal and affidavit of Eben W. Martin; the motion to transfer the cause to the circuit court of the United States, district of South Dakota, and resistance of said motion, constitute all the papers in the above-entitled cause on file in my said office, and that they are hereby certified and transmitted to the circuit court of the United States, district of South Dakota, pursuant to order of this court, bearing date March 1st, 1890, transferring said cause to said United States circuit court, a certified copy of which order is hereto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 12th day of March, A. D. 1890.

IVAN W. GOODNER,
[SEAL.] *Clerk of the Supreme Court.*

146 Thereupon, afterwards, to wit, on the 1st day of April, 1890, the following proceedings were had in said case, as appears of record on folio 9 of Journal "A" of eastern division of said court, to wit:

VICTOR DORNE
*vs.*
RICHMOND SILVER MINING COMPANY, a Corporation.
Order of Continuance.

On motion, all parties consenting thereto, it is ordered by the court that this cause be, and the same is hereby, continued to the July term of this court, to be held at Deadwood, within the western division of the district.

147 Thereupon, afterwards, to wit, on the 22nd day of August, 1890, a notice of trial, general, and note of issue *was* filed in said case by defendant, the same being in words and figures following, to wit:

*Note of Issue.*

UNITED STATES OF AMERICA,
*State of South Dakota, South Dakota Judicial District, Western Division,* } *ss:*

In the U. S. Circuit Court in and for the District of South Dakota, Western Division, Adjourned Term, September, 1890.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't. } Note of Issue.

Martin & Mason, attorneys for plaintiff; Van Cise & Wilson, attorneys for defendant.

To the clerk of the above-named court:

You will please take notice that the last pleading was served and issue was joined in the above-entitled action prior to the admission of this State into the Union, and this case was regularly transferred to this court by an order of the State supreme court at its February term, 1890.

Dated at Deadwood, S. D., this 18th day of August, 1890.

VAN CISE & WILSON,
*Attorneys for Def't.*

Filed in the office of the clerk of said court the 22nd day of August, 1890.

O. S. PENDAR,
*Clerk U. S. Circuit Court,*
By C. A. COE, *Deputy.*

Upon the back of said "notice, etc.," appear endorsements in words and figures following, to wit:

United States of America, State of South Dakota. In U. S. circuit court, district of South Dakota. Victor Dorne, pl'ff, *vs.* Richmond Silver Mining Company. Notice of trial, general, and note of issue. Please to take notice that this action will be brought on for trial at the next regular adjourned term of this court, to be held at the court-house, in the city of Deadwood, in the county of Lawrence, on the 1st day of September, 1890, at the opening of the court on that day or as soon thereafter as counsel can be heard. Dated the 18 day of August, 1890. Yours, &cc., Van Cise & Wilson, attorneys for def't. To Martin & Mason, attorney- for pl'ff. Due service of a notice, of which the above is a copy, is admitted Aug. 20, 1890. Martin & Mason, attorney- for pl'ff. Dated Deadwood, S. D., Aug. 20, 1890.

Thereupon, afterwards, to wit, on the 1st day of September, 1890, a notice of motion to remand was filed in said case by the plaintiff; which said notice of motion is in words and figures following, to wit:

148 In the Circuit Court of the U. S., 8th Judicial Circuit, in and for the Western Division of the District of South Dakota.

VICTOR DORNE, Plaintiff & Respondent,
*vs.*
RICHMOND SILVER MINING CO., Defendant & Appellant. } Notice of Motion.

Please take notice that on Monday, the first day of September, 1890, at the court-room of the circuit court of the United States, in the city of Deadwood, Lawrence county, State of South Dakota, at the opening of the court upon that date or as soon thereafter as counsel can be heard, the plaintiff will move the above-entitled court to remand this suit to the supreme court of the State of South Dakota upon the following grounds, to wit:

1st. That the said cause has been improperly transferred from the supreme court of the State of South Dakota to this court.

2nd. That such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court.

3rd. Other grounds appearing from the papers, pleading, and proceedings in this case. The said motion will be made upon the pleadings, bond given by the defendant upon appeal from the district court of Lawrence county, Territory of Dakota, to the supreme court of the Territory of Dakota, and all papers and proceedings in this suit, and the plaintiff will apply for the remanding of the said case to the supreme court of the State of South Dakota, and for such other and further relief as may be just.

MARTIN & MASON,
MOODY & WASHABAUGH,

149 *Attorneys for Plaintiff and Respondent, Appearing Specially for the Purposes of this Motion Only.*

Dated Deadwood, South Dakota, August 20, 1890.

To Messrs. Van Cise & Wilson & W. C. Kingsley, Esq., attorneys for defendant and appellant.

(Endorsed:) In the circuit court of the United States. Victor Dorne *vs.* Richmond Silver Mining Co. Notice of motion. Service by copy admitted. Deadwood, Dakota, Aug. 20, 1890. Van Cise & Wilson, attorneys for def't. Filed this 1st day of September, 1890. O. S. Pendar, clerk. Martin & Mason, att'ys — plaintiff.

150 Thereupon, afterwards, to wit, on the 2nd day of September, 1890, the following proceedings were had in said case, as appears of record on folio 7 of Journal "A" of western division of said court, to wit:

VICTOR DORNE
*vs.*
RICHMOND SILVER MINING COMPANY. } Order to File Briefs.

Ordered that the several parties to this cause prepare briefs, the same to be duly submitted to this court.

151 Thereupon, afterwards, to wit, on the 5th day of September, 1890, the following proceedings were had in said case, as appears of record on folio 9 of Journal "A" of western division of said court, to wit:

VICTOR DORNE
*vs.*
RICHMOND SILVER MINING COMPANY. } Order Transferring Cause, by Consent, to Eastern Division.

On motion, all parties consenting thereto, it is ordered that all files and papers pertaining to this cause be, and the same are hereby, transferred from the western division of this district to the eastern division thereof, and said cause be argued and submitted in said eastern division.

152 Thereupon, afterwards, to wit, on the 15th day of September, 1890, a certified copy of the order transferring cause was filed in said case in the eastern division; which certified copy of order is in words and figures following, to wit:

At a session of the circuit court of the United States for the district of South Dakota continued and held, pursuant to adjournment, at the United States court-room, in the city of Deadwood, within the western division of said district, on the 5th day of September, A. D. 1890, the Honorable A. J. Edgerton, U. S. district judge, being present and presiding in said court, the following, among other, proceedings were had and done, to wit:

VICTOR DORNE
*vs.*
RICHMOND SILVER MINING COMPANY. } Order Transferring Cause, by Consent, to Eastern Division.

On motion, all parties consenting thereto, it is ordered that all files and papers pertaining to this cause be, and the same are hereby, transferred from the western division of this district to the eastern division thereof, and said cause be argued and submitted in said eastern division.

THE UNITED STATES OF AMERICA,
*District of South Dakota,* } *ss:*

I, O. S. Pendar, clerk of the circuit court of the United States for the district of South Dakota, do hereby certify that the above and foregoing is a true copy of an order entered upon the journal of the proceedings of said court in the cause therein entitled; that I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thereof.

(Seal U. S. Circuit Court.)

Witness my official signature and the seal of said court, at Deadwood, in said district, this 5th day of September, A. D. 1890.

O. S. PENDAR, *Clerk.*

Upon the back of said copy of order appear endorsements in words and figures following, to wit:

Victor Dorne *vs.* Richmond Silver Mining Company. Certf. copy of order transferring from western to eastern division. Filed in eastern division September 15, 1890.

Thereupon, afterwards, to wit, on the 5th day of November, 1890, a notice of motion & affidavit was filed in said case by the plaintiff; which said notice & affidavit *is* in words and figures following, to wit:

153 In the Circuit Court of the United States, Eighth Judicial Circuit, in and for the Western Division of the District of South Dakota.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.
} Notice of Motion.

Please take notice that, upon the affidavit herewith served upon you and upon the proceedings and record of this case, the undersigned will move the above-entitled court, at the court-room, in Sioux Falls, South Dakota, on November 6, 1890, at 10 o'clock a. m. of said date, or as soon thereafter as counsel can be heard, for an order dismissing the appeal in this case for want of prosecution and for failure to file and serve abstract and brief, and will move the court for an affirmance of the judgment rendered in the district court of Lawrence county, Territory of Dakota, in this case, on April 15, 1889, and for such other and further relief as may be just.

MOODY & WASHABAUGH,
MARTIN & MASON,
*Attorneys for Plaintiff and Respondent.*

To the defendant and Messrs. Van Cise & Wilson and W. C. Kingsley, its attorneys.

154 In the Circuit Court of the United States, Eighth Judicial Circuit, in and for the Western Division of the District of South Dakota.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.
} Affidavit.

STATE OF SOUTH DAKOTA, } *ss:*
*County of Lawrence,* }

Norman T. Mason, being duly sworn, deposes and says he is a member of the law firm of Martin & Mason, practicing law in Deadwood, Lawrence county, South Dakota, and is one of the attorneys for the plaintiff, Victor Dorne, in the above-entitled action; that on the 15th day of April, 1889, judgment was recovered, entered, and docketed in the district court of Dakota in and for Lawrence county, in favor of the plaintiff, Victor Dorne, and against the defendant, The Richmond Silver Mining Company, in the sum of fifteen thousand three hundred and seventy-five and $\frac{75}{100}$ dollars ($15,375.75), a copy of which judgment is hereto attached, marked Exhibit "A," and made a part of this affidavit; that on the 8th day of October, 1889, the attorneys for the defendant served on the attorneys for the plaintiff their notice of appeal in the said case to the supreme court of the Territory of Dakota; that at the same time, on October 8th, 1889, the attorneys for the defendant served upon the attorneys for the plaintiff a copy of their undertaking upon appeal in this case; that thereafter this case was transferred, upon the application of the attorneys for the defendant, from the supreme court of
155 the Territory of Dakota to this court, where the said case is now pending; that, so far as the attorneys for the plaintiff are informed, no further steps have been taken by the defendant or its counsel toward perfecting or prosecuting the appeal in this case; that counsel for plaintiff and respondent have not been served with a copy of the abridgment or abstract of the record of this case, nor have they been served with a copy of appellant's brief in this case; that, so far as counsel for respondent is informed, no abridgment or abstract of record and no brief has been prepared on behalf of the defendant and appellant in this case.

NORMAN T. MASON.

Subscribed and sworn to before me this 29th day of October, A. D. 1890.

EDWARD K. DEPUY,
*Notary Public.*

[SEAL.]

EXHIBIT "A."

VICTOR DORNE
*vs.*
RICHMOND SILVER MINING COMPANY.

The issues in this case having been brought on regularly for trial before the above-entitled court, at the court-house, in the city of Deadwood, Lawrence county, South Dakota, and a jury duly and legally empanelled, and the said cause having been regularly tried on the 10th, 11th, 12th, and 13th days of April, A. D. 1889, and the said trial being begun on April 10th and concluding on April 13th, 1889, said plaintiff appearing in person and by his attorneys,
156 Moody & Washabaugh and Martin & Mason, and the defendant appearing by its attorneys, W. C. Kingsley and Messrs. Van Cise & Wilson, and the said parties having respectively introduced their proof, and a verdict for the plaintiff and against the defendant and all the issues, and assessing plaintiff's damages at fifteen thousand three hundred fifteen and $\frac{70}{100}$ dollars, having been fully rendered on the 13th day of April, 1889:

Now, therefore, on motion of plaintiff's counsel, it is hereby ordered and adjudged that the plaintiff, Victor Dorne, have and recover of the defendant, The Richmond Silver Mining Company, the sum of fifteen thousand three hundred fifteen and $\frac{70}{100}$ dollars damages, the amount found and assessed by the jury, with the costs and disbursements, in the sum of sixty and $\frac{5}{100}$ —, to be taxed and inserted herein, and that execution issue accordingly.

Done in open court this 15th day of April, A. D. 1889.

By the court:

CHARLES M. THOMAS, *Judge.*

(Endorsed:) In the United States circuit court. Victor Dorne *vs.* Richmond Silver Mining Company. Filed this 5th day of November, 1890. O. S. Pendar, clerk. Notice of motion and affidavit.

Service by copy admitted.
Deadwood, Dakota, Oct. 29, 1890.

VAN CISE & WILSON,
*Attorneys for Def't.*
MARTIN & MASON,
*Att'ys for Plaintiff.*

Thereupon, afterwards, to wit, on the same day, an affidavit was filed in said case by the defendant; which affidavit is in words and figures following, to wit:

157 In United States Circuit Court, State of South Dakota, October Term, 1890.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING CO., Def't.

STATE OF SOUTH DAKOTA, *Minnehaha County*, } *ss:*

Edwin Van Cise, being sworn, says he is one of the attorneys for defendant in the above-entitled action; that on the 23d day of January, 1890, the attorneys for plaintiff served on attorneys for defendant a notice of motion to dismiss the appeal in this action in the supreme court of South Dakota and certain papers therewith which affiant exhibits to the court with this affidavit; that said motion to dismiss there was based on the same grounds as now urged here; that the motion was heard by the supreme court in connection with a motion made by affiant to transfer the cause to this court; that the motion to transfer was allowed and the motion to dismiss was disallowed, although no formal order was made in the premises; that this was at the February, 1890, term of said supreme court; that affiant had not printed an abstract or brief in this case in the supreme court for the reason that he intended from the time of the taking of the appeal, October, 8th, 1889, to apply for a transfer of the cause to this court and did not want to take any steps in the supreme court of the State that would waive his right to transfer; that very soon after learning that the cause had been transferred to this court affiant wrote to the clerk of this court, or possibly the judge (affiant is not now sure which and has not his letter book
158 here for examination), inquiring for a copy of the rules of this court and whether any rules were in force requiring the printing of abstract and brief in cases transferred as this one, and affiant received an answer in the negative, or that there were no rules on the subject. Subsequently affiant was furnished a copy of some rules adopted by this court, but none of them covered this question, and affiant knows of no rule requiring the abstract and brief in this case to be printed before it can be reviewed here, or had he known of such a rule he would have cheerfully complied therewith and had the same printed for use at this time. Affiant further says that one term of this court has been held in Deadwood for the western division since the transfer of this cause and no question was then raised as to the necessity of printing of abstract or brief, so as to bring it before the court, although it was then well understood between counsel and by the court that if the motion to remand then made should be denied this case should be — for hearing at this term of court for the eastern division.

EDWIN VAN CISE.

Subscribed and sworn to before me this 5th day of November, 1890.

[SEAL.] O. S. PENDAR, *Clerk.*

(Endorsed:) Victor Dorne *vs.* Richmond Silver Mining Co. Affidavit, def'd't. Filed this 5th day of November, 1890. O. S. Pendar, clerk.

Thereupon, afterwards, to wit, on the 6th day of November, 1890, an affidavit as to corporation was filed in said case by defendant, same being in words & figures following, to wit:

159 In the Circuit Court of the United States, District of South Dakota.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

STATE OF SOUTH DAKOTA, *Minnehaha County*, } *ss:*

Edwin Van Cise, being sworn, says he is one of the attorneys for the defendant and appellant; that said defendant is and was at the time this action was brought a corporation created, incorporated, organized, and existing under the laws of the State of New York.

And affiant now makes this averment and by leave of court files this affidavit for the purpose of fuller compliance with law as to showing the citizenship and organization of defendant.

EDWIN VAN CISE.

Subscribed and sworn to before me this 6th day of November, A. D. 1890.

[SEAL.] O. S. PENDAR, *Clerk.*

(Endorsed:) Victor Dorne *vs.* Richmond S. Min. Co. Affidavit of Van Cise as to corporation. Filed this 6th day of November, 1890. O. S. Pendar, clerk.

Thereupon, afterwards, to wit, on the same day, objections to affidavit as to corporation filed by defendant was filed in said case by the plaintiff; which said objections *is* in words and figures following, to wit:

160 In Circuit Court of the United States, District of South Dakota.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

Now comes the plaintiff, by E. W. Martin, his attorney, and objects to the reading, receiving, considering, or filing of the affidavit of Edwin Van Cise made and presented this day herein upon the ground that it is immaterial, irrelevant, and incompetent, and cannot now be received, the question of transfer from the supreme court

of South Dakota and the question of remanding this case to said court having been already determined without the offer of this or similar evidence.

VICTOR DORNE, *Plaintiff.*
E. W. MARTIN,
*One of His Attorneys.*

Sioux Falls, S. Dak., November 6th, 1890.

(Endorsed:) In U. S. circuit court. Victor Dorne *vs.* Richmond Silver Mining Company. Objections to affidavit of Edwin Van Cise. Nov. 6th, 1890. Filed this 6th day of November, 1890. O. S. Pendar, clerk. Martin & Mason, for pl'ff & respondent.

Thereupon, afterwards, to wit, on the 7th day of November, 1890, an order overruling motion to dismiss was filed in said case; which said order is in words and figures following, to wit:

161 In the Circuit Court of the United States, District of South Dakota, Western Division, Heard by Consent in Eastern Division, October Term, 1890.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING CO., Def't.

Now, at this time, coming on to be heard the motion of the plaintiff and respondent to dismiss the appeal herein and affirm the judgment of the trial court, after hearing E. W. Martin on behalf of said motion and Edwin Van Cise *contra*—

Ordered that said motion be, and the same is hereby, overruled and denied.

Done this 5th day of November, A. D. 1890.

By the court:

O. P. SHIRAS, *Judge.*

(Endorsed:) Victor Dorne *vs.* Richmond S. M. Co. Order overruling motion to dismiss. Filed this 7th day of November, 1890. O. S. Pendar, clerk.

Thereupon, afterwards, to wit, on the 8th day of November, 1890, an order overruling motion to remand was filed in said case; which said order is in words and figures following, to wit:

162 In the Circuit Court of the United States for the District of South Dakota, Western Division, Adjourned Term, September, 1890.

VICTOR DORNE, Pl'ff,
*vs.*
RICHMOND SILVER MINING COMPANY, Def't.

Now, at this time, coming on to be heard the motion and application of the plaintiff, Victor Dorne, for an order remanding this

case to the supreme court of the State of South Dakota, after hearing Messrs. Martin & Mason on behalf of said motion and application and Messrs. Van Cise & Wilson *contra*, and the court being fully advised in the premises—

It is ordered that said motion and application be, and the same is hereby, overruled and denied.

Done this 5th day of September, 1890.

By the court:

A. J. EDGERTON, *Judge*.

To which order and ruling of the court counsel for Dorne duly excepted, and at his request this exception is certified and allowed.

A. J. EDGERTON, *Judge*.

(Endorsed:) Victor Dorne *vs.* Richmond Silver Mining Co. Order overruling motion — remand. Filed this 8th day of November, 1890. O. S. Pendar, clerk.

163 Thereupon, afterwards, to wit, on the 11th day of November, 1890, an opinion of court refusing to remand the case to State court was filed in said case; which said opinion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of South Dakota.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.

This action was brought by the plaintiff, Victor Dorne, against the Richmond Silver Mining Company in the month of October, 1883, in the district court of the Territory of Dakota for the county of Lawrence to recover damages for breach of contract. The case was tried in April, 1889, and a verdict rendered in favor of the plaintiff April 15, 1889, for $15,375.75. The defendant appealed from the judgment to the supreme court of the Territory of Dakota, and the cause was pending on appeal at the time of the admission of South Dakota as a State on November 2nd, 1889. The defendant moved to transfer the case from the supreme court of the State to this court upon the grounds of diverse citizenship.

At the February, 1890, term the supreme court of South Dakota transferred the case to this court. The plaintiff now moves the court to remand the case to the supreme court of South Dakota.

164 The motion to transfer the case from the State court to this court was not *ex parte*, but the question was fully presented *pro* and *con*. by the plaintiff and defendant and was carefully considered by that court. (See 44 N. W. Rep., pg. 1021.)

The contention of the respondent is that sec. 2 of article III of the Constitution of the United States only authorizes Congress to extend the jurisdiction of the Federal courts in cases where no other

cause exists than diverse citizenship "to controversies between citizens of different States" and not between citizens of a State and Territory.

Section 23 of the enabling act attempts to confer jurisdiction on the Federal courts of the States admitted under it in all cases "whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases;" that at the time this action was commenced the plaintiff was a citizen of a Territory, and consequently could not transfer his case to the Federal court. Therefore, if this section attempts to give the Federal court jurisdiction in this class of cases by reason of diverse citizenship, to that extent the law is unconstitutional. This is the contention of the respondent, and upon this ground he asks for an order remanding the case to the State court.

There are three propositions submitted to the court in the consideration of this question:

First. Was it the intention of Congress in the enabling act to embrace this class of cases among those to which the Federal courts should succeed the territorial court?

Second. If it was, is that portion of the act in conflict with article III of the Constitution of the United States?

165 Third. If so, what court, if any, has jurisdiction of this case? When a Territory is admitted into the Union the cases then pending in the territorial courts abate unless Congress in some measure, either directly or inferentially, provides for their survival.

The Territory of Dakota was not admitted by Congress into the Union as one State, but was divided into two States and the two States admitted at the same time. Neither States succeeded the Territory except as provided in the enabling act, and unless Congress, by some legislation, either in the act of admission or elsewhere, provided for the survival of causes pending at the time of admission, then all such cases abate.

The Supreme Court, in Benner *vs.* Porter, 9 Howard, 246, said, *inter alia:* "The territorial courts were the courts of the General Government, and the records in the custody of their clerks the records of that Government, and it would seem to follow, necessarily, from these premises that no one could legally take the possession or custody of the same without the assent, express or implied, of Congress. Such assent is essential, upon the plainest principles, to an authorized change of their custody." * * *

In Hunt *v.* Palao, 4 Howard, 590, the court held that * * * "the territorial court of appeals was a court of the United States, and the control over its records therefore belongs to the General Government and not to the State authorities, and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred and how these judgments shall be carried into execution or reviewed upon appeal or writ of error." * * *

Also in Express Co. *vs.* Kountze Brothers, 8 Wall., page 342, Mr. Justice Davis, in delivering the opinion of the court, says: "Before

proceeding to consider the merits of this controversy, it is
166 necessary to dispose of the point of jurisdiction which is raised. It is urged that the circuit court had no jurisdiction over the cause because there was no authority to transfer it. This depends on the construction of the acts of Congress relating to the subject. On the admission of a new State into the Union it becomes necessary to provide, not only for the judgments and decrees of the territorial courts, but also for their unfinished business. In recognition of this necessity, Congress, after Florida became a State, passed an act providing, among other things, that all cases of Federal character and jurisdiction pending in the courts of the Territory be transferred to the district court of the United States for the district of Florida. The provisions of this act were made applicable at the time of its passage to cases pending in the courts of the late Territory of Michigan, and were afterwards extended to the courts of the late Territory of Iowa. Congress in making this provision for the changed condition of Iowa thought proper in the same act to adopt a permanent system on this subject and extended the provisions of the original and supplementary acts to cases from all Territories which should afterwards be formed into States."

* * * * * * *

"It is said, if cases of a Federal character were properly transferrable to the circuit court, this was not one of them, because it does not appear that the suit was between citizens of different States."

* * * * * * *

"The course of proceeding in the court below shows that the parties to the suit recognized it as being of Federal jurisdiction, and it could only be so (as there was no Federal question involved)
167 on the ground that the plaintiffs and defendant were citizens of different States." * * *

See also Baker *v.* Morton, 12 Wall., page 153. * * * "Whenever a Territory is admitted into the Union as a State the case- pending in the territorial courts of a Federal character or jurisdiction are transferred to the proper Federal court, but all such as are not cognizable in the Federal courts are transferred to the tribunals of the new State. Pending cases, where the Federal and State courts have concurrent jurisdiction, may be transferred either to the State or Federal courts by either party possessing that option under the existing laws." * * *

This action was commenced in the territorial court of Dakota, and was pending in the supreme court of the Territory when its courts ceased to exist by the formation and admission of the States of South Dakota and North Dakota into the Union. The inquiry is, What provision, if any, was made for the survival of cases pending in the territorial courts at the time of the admission of the States?

Section 23 of the enabling act for the admission of the States professes to make full and complete provision for the survival of all such cases, and reads as follows:

"That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the Territories mentioned in this act at the time of the admission into the Union

of either of the States mentioned in this act, and arising within the limits of any such State, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts,
168 respectively, shall be the successors of said supreme and district courts of said Territory, and in respect to all other cases, proceedings, and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of any of the States mentioned in this act shall be pending in any territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be tranferred and proceeded with in the proper United States circuit, district, or State court, as the case may be: Provided, however, that in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request, such cases shall be proceeded with in the proper State courts."

It is admitted that the appellant filed the written request in the proper court.

It is conceded that the United States circuit court would not have had jurisdiction of the action at the time of its commencement for the reason that the plaintiff was a citizen of a Territory;
169 but that is not the question involved in this inquiry. The law provides that upon a written request all cases shall be transferred to the Federal circuit and district courts after admission, provided such court- would have had jurisdiction of the same under the laws of the United States when the action was commenced had such court- existed, and that as to such cases the Federal courts shall be successor of the territorial court. Now, no circuit court of the United States can exist except in a State admitted into the Union. Then, to state the proposition differently, the enabling act gives jurisdiction at the commencement of the action, provided South Dakota had at that time been a State in the Union and the circuit court of the United States organized herein. This much for the intention of Congress in the matter.

In view of the history of the admission of new States and the legislation of Congress and the decisions of the Supreme Court upon this question it leaves no doubt in my mind as to the intention of Congress to provide in the enabling act that the Federal court should succeed the territorial courts in this class of cases whenever a writ-

ten request was filed as provided in the act. The next inquiry is whether that provision of the enabling act is unconstitutional. Courts are very reluctant to decide that particular legislation is unconstitutional.

The Supreme Court of the United States in "The Mayor *v.* Cooper," reported in 6 Wall., pg. 247, makes use of the following language when the question of the constitutionality of an act of Congress was raised: "This court has the power to declare an act of Congress to be repugnant to the Constitution and therefore invalid; but the duty is one of great delicacy, and only to be performed where
170 the repugnancy is clear and the conflict irreconcilable. Every doubt is to be resolved in favor of the constitutionality of the law."

The case of "Gaffney *v.* Gillette *et al.*," reported in 4 Dillon, pg. 264, was in many particulars like the case at bar. The court was asked to remand and the motion was allowed upon the sole and only grounds that the petitioner had waived his right for removal to the Federal court and had elected to remain in the State court. It would be a matter of surprise that neither the attorneys nor the court should allude to the fact if the petitioner was precluded upon constitutional grounds from removing his case to the United States courts, and that the Federal court had no jurisdiction because one party was a citizen of a Territory when the action was commenced.

I have examined with some care the numerous cases to which my attention has been called and find that they are cases in which the courts, construe the meaning of the words embraced in the several removal acts as to when the diverse citizenship must exist to entitle the petitioner to a transfer from a State court. Now, in this case the same difficulty does not exist, for entirely different terms are used, and what construction courts may place on doubtful words in prior laws furnishes slight authority for the interpretation of this.

Congress did not attempt to transfer cases to the Federal court where the Federal jurisdiction was based upon diverse citizenship, in controversies between citizens of a State and a Territory, but only between citizens of different States. The transfer could only be made after the admission of the State. It was then that the case became one of a Federal jurisdiction, and the fact that Congress declared that the Federal courts should succeed in those
171 cases where the citizenship was diverse when the action was commenced did not prevent the cause from becoming one of Federal character and jurisdiction after the State was admitted if the citizenship was diverse when the State was admitted and the cause transferred.

It is solely a question of survival and succession. The Territory had ceased to exist, and it became a controversy between a citizen of this State and the citizen of another State when by the act of Congress the succession was established and the transfer effected. The antecedent date, to wit, the date of the commencement of the action, neither established nor deprived the cause of its Federal character. That became fixed when the State was admitted.

Have the State courts any jurisdiction in the premises?

Congress has established the succession of cases pending in the territorial courts at the time of admission in the following words: No proceedings, &c., "shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district, or State court, as the case may be," &c., with the proviso in reference to the request.

By the terms of the enabling act, "in the absence of such request such cases shall be proceeded with in the proper State courts." This becomes a condition attached to the grant of jurisdiction to the State court by Congres, or, in the words of the act, to the transfer of the case to the State court.

This court, then, is the only court which has any jurisdiction of this class of cases pending in the territorial court at the time of admission, where the conditions in the proviso to sec. 23 of the enabling act have been observed. In order to give the State
172 court jurisdiction Congress, and possibly the State, must have conferred the jurisdiction. After the performance of the conditions of the proviso of sec. 23 Congress has conferred exclusive jurisdiction on the Federal courts in this class of cases, and the State in its ordinance has ratified the terms; consequently either this court has the exclusive jurisdiction or else no court has jurisdiction.

If the congressional legislation in reference to the survival of this class of cases is unconstitutional, then there is no provision for their survival and they must abate.

This case has been transferred to this court by the supreme court of South Dakota under the provisions of the enabling act and the constitution of this State, and I find no reason to remand the same.

By the court:

A. J. EDGERTON, *Judge.*

Sioux Falls, S. D., October 27, 1890.

Upon the back of said opinion appear endorsements in words and figures following, to wit:

U. S. circuit court, district of South Dakota. Victor Dorne, pl'f, *vs.* Richmond Silver Mining Co., d'f't. Opinion of court refusing to remand the case to State court. Edgerton, J. Filed Nov. 11th, 1890. O. S. Pendar, clerk.

Thereupon, afterwards, to wit, on the 25th day of May, 1891, an order was filed in said case; which said order is in words and figures following, to wit:

173 In the Circuit Court of the United States for the District of South Dakota, Western Division.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant. } Order.

This action having been transferred to this court upon the application of defendant and appellant from the supreme court of the

State of South Dakota, where the record then was by virtue of its pending on appeal in the supreme court of Dakota Territory at the time of the admission of the State of South Dakota into the Union, and the same having been heard here upon the record so transferred from said supreme court, Messrs. Van Cise and Wilson appearing for defendant and appellant, and Messrs. Martin and Mason for plaintiff and respondent, and the case being heard by consent of counsel at Sioux Falls, in the eastern division, and the court being fully advised in the premises—

It is ordered that the judgment of the trial court herein be reversed and a new trial granted unless the plaintiff and respondent or his attorneys file in this court, within ten days from this date, a consent in writing to remit one-half of the judgment rendered in the action, in which event a judgment of affirmance for one-half such original judgment, with interest thereon at 7 % per annum from the date of entry thereof, may be entered as the judgment of this court, without costs to either party.

Done this 25 day of May, A. D. 1891, at Sioux Falls, South Dakota.

By the court:

A. J. EDGERTON, *Judge.*

To which order and ruling of the court counsel for defendant and appellant, and also counsel for respondent, at the time duly excepted, and at their request this exception is signed and certified.

A. J. EDGERTON, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

Victor Dorne *vs.* Richmond Silver Mining Company. Order. Filed May 25th, 1891. O. S. Pendar, clerk.

174 Thereupon, afterwards, to wit, on the 25th day of May, 1891, a remittitur was filed in said case by the plaintiff and respondent; which said remittitur is in words and figures following, to wit:

In the United States Circuit Court, District of South Dakota.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant. } Remittitur.

Judgment having been entered in the above-entitled cause by the district court of the Territory of Dakota in and for the county of Lawrence, on April 15, 1889, for the sum of $15,375.75, in favor of the plaintiff, Victor Dorne, and against the defendant, Richmond Silver Mining Company, and the said cause having been appealed by the defendant to the supreme court of the Territory of Dakota, and having, upon the admission of the State of South Dakota into the Union, been transferred to the above entitled court, the circuit

court of the United States in and for the State of South Dakota, and having been tried before the said court upon appeal, and the said court having ordered an affirmance of the judgment of the said territorial district court for one-half of its amount and interest, but having required as a condition of such affirmance that the plaintiff should file in this court a remittitur of one-half of the said judgment of the territorial district court, now comes the plaintiff, Victor

175 Dorne, by his counsel, and here file a remittitur of one-half of the said judgment of the district court of the Territory of Dakota in and for Lawrence county, to wit, for the sum of seven thousand six hundred eighty-seven and $\frac{88}{100}$ dollars ($7,687.88), and interest thereon from April 15, 1889.

May 12, 1891.

VICTOR DORNE.
MARTIN & MASON,
MOODY & WASHABAUGH,
*Attorneys for Plaintiff and Respondent.*

Upon the back of said remittitur appear endorsements in words and figures following to wit:

In the U. S. circuit court. Victor Dorne, plaintiff and respondent, *vs.* Richmond Silver M. Co., defendant and appellant. Filed May 25th, 1891. O. S. Pendar, clerk. Remittitur. Martin & Mason, attorneys for plaintiff.

176 Thereupon, afterwards, to wit, on the 30th day of May, 1891, an order extending time for settling bill of exceptions was filed in said case; which said order is in words and figures following, to wit:

In the United States Circuit Court, District of South Dakota.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.

It is hereby ordered that the time for settling the bill of exceptions in the above-entitled action be extended for sixty days, and as the judge of the district is to be absent therefrom, it is further ordered that the Hon. A. D. Thomas, holding the term of this court at Deadwood, South Dakota, be, and is hereby, authorized to settle and sign the same.

May 30th, 1891.

By the court:

A. J. EDGERTON, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

Victor Dorne *vs.* Richmond Silver Mining Company. Order extending time for settling bill of exceptions 60 days & authorizing Judge A. D. Thomas to settle same. Filed May 30th, 1891. O. S. Pendar, clerk.

Thereupon, afterwards, to wit, on the same day, a bill of exceptions was filed in the case, said bill of exceptions being in words and figures following, to wit:

177 In the Circuit Court of the United States for the District of South Dakota, Western Division.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.

Be it remembered that this cause came on to be heard before the court on the 6th, 7th, and 8th of November, 1890, pursuant to a transfer from the supreme court of the State of South Dakota, the same having been pending in the supreme court of Dakota Territory on appeal from the judgment of the trial court and from the order overruling the motion for a new trial at the time of the admission of the State of South Dakota into the Union; and thereupon, at the time aforesaid, Messrs. Van Cise & Wilson appeared as attorneys for defendant and appellant, and Messrs. Martin & Mason as attorneys for plaintiff and respondent, and by their consent the cause was heard and submitted to the court, at Sioux Falls, in the eastern division, the same being then holden by the Hon. A. J. Edgerton, judge of the district court of the district of South Dakota, and Hon. O. P. Shiras, judge of the district court for the northern district of Iowa, and said cause was then presented to this court, as the successor of the supreme court of Dakota Territory, upon the record in said court at the time of the admission of South Dakota as a State, and duly certified and transferred to this court, to wit, the summons, amended complaint, answer, verdict, judgment, and bill of exceptions, including the motion for a new trial, affidavits used in support thereof, and order of the court denying and refusing the same, and the assignment of errors made and filed by appellant, and the same was duly heard by this court upon said record, except that the court declined to consider the affidavits used in support of the motion for new trial and limited its consideration of the appeal from the judgment and from the order overruling the motion for a new trial to the assignments of errors of law
178 occurring during the trial; to which action of the court in declining to consider such affidavits and limiting its consideration aforesaid counsel for defendant and appellant at the time duly excepted, and, after taking this cause under advisement and upon due consideration, this court, being of the opinion that reversible error had been committed in the trial court upon the question of damages, but that the judgment of the trial court could be affirmed for one-half the amount thereof, provided plaintiff would consent to remit the balance, made the order in the premises of date May 8th, 1891, and now appearing of record herein; to which defendant and appellant at the time duly excepted.

And forasmuch as the foregoing proceedings were had in this cause and counsel for defendant and appellant are in doubt whether

the same now appear fully of record herein, this is now, at their request, signed, settled, and certified as constituting, with the record and assignment of errors certified to this court from the supreme court of South Dakota, as hereinbefore stated, and the order of this court of May 8th, 1891, a full, true, and correct bill of exceptions in this cause.

Witness my hand, at Sioux Falls, in the State of South Dakota, this 25th day of May, 1891.

A. J. EDGERTON, *Judge.*

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit:

Victor Dorne *vs.* Richmond Silver Mining Company. Bill of exceptions. Filed May 30th, 1891.

Thereupon, afterwards, to wit, on the 30th day of May, 1891, judgment was filed in said case and duly entered of record; which said judgment is in words and figures following, to wit:

179 In the Circuit Court of the United States for the District of South Dakota, Western Division.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant. } Judgment.

This action having been tried in the district court of the first judicial district of Dakota Territory in and for Lawrence county and a judgment rendered therein April 15th, 1889, for the sum of $15,375.75, in favor of the plaintiff and respondent, Victor Dorne, and against the defendant and appellant, Richmond Silver Mining Company, and an appeal having been taken by said defendant and appellant from said judgment and from the order of the court overruling the motion for a new trial to the supreme court of said Territory, and said appeal being there pending at the time of the admission of the State of South Dakota into the Union, and thereupon the said action and all the records, files, and proceedings therein having been transferred to this court upon the application of defendant and appellant, and the same having been duly heard and considered by this court upon said record, Messrs. Van Cise & Wilson appearing for defendant and appellant, and Messrs. Martin & Mason for plaintiff and respondent, and arguing and submitting the same by consent to the court, sitting at Sioux Falls, in the eastern division, and the court, upon due consideration, having ordered that the judgment of the trial court should be reversed and a new trial granted unless the plaintiff and respondent or his attorneys should file in this court, within ten days from the date of the order, a consent in writing to remit one-half of the judgment so rendered in the trial court, in which event said judgment should be affirmed without costs to the extent of one-half the amount thereof, with interest at 7 % per annum from the date of entry thereof by the trial

court, and the said plaintiff and respondent, by his attorneys, Messrs. Martin & Mason and Moody & Washabaugh, having filed
180 such consent in this court and remitting from said judgment the one-half thereof, to wit, the sum of seven thousand six hundred and eighty-seven dollars and eighty-eight cents, and interest thereon from April 15, 1889:

Now, therefore, on motion of said attorneys for plaintiff and respondent—

It is ordered, considered, and adjudged that the judgment of the trial court be affirmed to the extent of one-half the amount thereof, with interest as aforesaid, and that the plaintiff and respondent, Victor Dorne, do have and recover of and from the defendant and appellant, Richmond Silver Mining Company, the sum of $7,687.87 and interest thereon at the rate of 7% per annum from April 15, 1889, amounting in all to the sum of eight thousand eight hundred and twenty-three dollars and ninety-six cents ($8,823.96), without costs to either party, plaintiff or defendant.

Done at Sioux Falls, in the eastern division of said district, this 25th day of May, 1891.

By the court:

A. J. EDGERTON, *Judge.*

To which order and judgment of the court counsel for defendant and appellant, and also counsel for respondent, at the time duly excepted, and at their request this exception is signed and certified.

A. J. EDGERTON, *Judge.*

Upon the back of said judgment appear endorsements in words and figures following, to wit:

Victor Dorne *vs.* Richmond Silver Mining Company. Judgment. Filed May 30th, 1891. O. S. Pendar, clerk.

Thereupon, afterwards, to wit, on the 30th day of May, 1891, assignment of errors was filed in said case by the defendant and appellant; which said assignment of errors is in words and figures following, to wit:

181 UNITED STATES OF AMERICA, } ss.:
*State of South Dakota,* }

In the Circuit Court of the United States in and for the District of South Dakota.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant. } Assignments of Error.

Now comes the defendant and appellant, by its attorneys, and says there is manifest error upon the face of the record, committed by this court in the hearing and determination of this action, in this:

I.

The court erred in declining to consider the affidavits used in support of the motion for new trial and in limiting its consideration of the appeal from the judgment and from the order overruling the motion for new trial to the assignments of errors of law occurring during the trial in the court below, to wit, the district court of the first judicial district of the Territory of Dakota.

II.

The court erred in its order of May 8th, 1891, in making its order of reversal conditioned on respondent's failure to remit one-half of the judgment and in providing that upon respondent's consenting to remit such half of the judgment a judgment of affirmance might be entered for the remaining half.

III.

The court erred in making said order of May 8th and in directing an affirmance of the judgment for one-half the amount thereof, provided the respondent would consent to remit the other half, for the reason that for the many errors assigned in the statement and assignment of errors made in the supreme court of the Territory and a part of the record therein certified from the supreme court of South Dakota to this court and made a part of the record herein and now specifically referred to and made a part of this assignment, the said judgment of the trial court ought to have been wholly reversed and set aside and a new trial of the action granted and the same set down for trial in this court.

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IV.

The court erred in making said order of May 8th, 1891, in that while conceding that reversible error had been committed in the trial court upon the question of damages, and that in a case of general verdict, it nevertheless held that the judgment of the trial court could be affirmed for one-half the amount thereof, provided plaintiff would consent to remit the balance.

V.

The court erred in making and entering a judgment in this action for one-half the original judgment and interest from the date of its rendition without costs to either party.

Wherefore, for the errors aforesaid, the defendant and appellant respectfully prays for a reversal of the judgment entered by this court, and that in lieu thereof a judgment of reversal may be entered and an order granting a new trial of the action in this court.

VAN CISE & WILSON,
*Att'y's for Def't & Appellant.*

Upon the back of said assignment of errors appear endorsements in words and figures following, to wit:

In U. S. circuit court. Victor Dorne *vs.* Richmond Silver Mining Company. Assignment of errors. Filed May 30th, 1891. O. S. Pendar, clerk.

183 Thereupon, afterwards, to wit, on the 30th day of May, 1891, a petition for writ of error was filed in said case by the defendant and appellant; which petition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of South Dakota, Western Division.

VICTOR DORNE, Plaintiff and Resp'd't,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellant.

To the honorable the circuit court and the clerk thereof:

The undersigned, Richmond Silver Mining Company, defendant and appellant in the above-entitled action, feeling aggrieved at the decision and judgment of the court made and entered herein May 25, 1891, in favor of the plaintiff for the sum of $8,823.96, respectfully petitions that a writ of error may issue, directed to this court, and directing it to send up, under its seal, to the Supreme Court of the United States the record and process herein for its inspection.

And so we will ever pray.

Dated May 30th, 1891.

RICHMOND SILVER MINING CO.,
*Def't and Appellant,*
By VAN CISE & WILSON, *Its Att'ys.*

Upon the back of said petition appear endorsements in words and figures following, to wit:

In U. S. circuit court. Victor Dorne *vs.* Richmond S. M. Co. Petition for writ of error. Filed May 30th, 1891. O. S. Pendar, clerk.

184 Thereupon, afterwards, to wit, on the 30th day of June, 1891, a petition for writ of error was filed in said case by the plaintiff; which petition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of South Dakota, Western Division.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Appellants.

To the honorable the circuit court and the clerk thereof:

The undersigned, Victor Dorne, plaintiff and respondent in the above-entitled action, feeling ag-rieved at the decision and judgment

of the court made and entered herein May 25th, 1891, in favor of the plaintiff for the sum of $8,823.96, respectfully petition- that a writ of error may issue, directed to this court, and directing it to send up, under its seal, to the Supreme Court of the United States the record and process herein for its inspection; and so we will ever pray.

Dated June 30th, 1891.

VICTOR DORNE,
*Plaintiff and Respondent,*
By MARTIN & MASON,
*His Attorneys.*

Upon the back of said petition appear endorsements in words and figures following, to wit:

In U. S. circuit —. Victor Dorne *vs.* Richmond Silver M. Co. Petition for writ of error. Filed June 30th, 1891. O. S. Pendar, clerk.

185 UNITED STATES OF AMERICA, } ss:
*Eighth Judicial Circuit, District of South Dakota,* }

By virtue of the foregoing writs of error and in obedience thereto, I, Oliver S. Pendar, clerk of the circuit court of the United States for the district of South Dakota, in the eighth circuit, do hereby certify that the foregoing folios, from one to 184, contain true and faithful transcripts of all the pleadings, process, and proceedings of record and on file in my office as said clerk, and the whole thereof and the endorsements thereon, in the case of Victor Dorne *vs.* Richmond Silver Mining Company, and of the opinion of the court filed in the case, and of the assignment of errors filed in the case by the defendant and appellant, The Richmond Silver Mining Company; and I also certify that a copy of the writs of error and a copy of the citation issued, wherein The Richmond Silver Mining Company is plaintiff in error, has been lodged and the same remain in my said office.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

Witness my hand and the seal of said court, at Sioux Falls, this 1st day of July, A. D. 1891.

OLIVER S. PENDAR,
*Clerk of the Circuit Court of the United States in and for the District of South Dakota.*

186 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the circuit court of the United States for the district of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Victor Dorne, plaintiff, and The Richmond Silver Mining Company, defendant, a manifest error hath

happened, to the great damage of the said defendant, The Richmond Silver Mining Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 30th day of May, A. D. 1891.

O. S. PENDAR,
*Clerk of the Circuit Court of the United States for the District of South Dakota.*

187 DISTRICT OF SOUTH DAKOTA, *ss:*

I, O. S. Pendar, clerk of the United States circuit court for the district of South Dakota, do hereby acknowledge due service of this writ by a true and correct copy of the same, and do hereby accept due and lawful service of said writ this 30th day of May, A. D. 1891, and file the same in my office this day.

O. S. PENDAR,
*Clerk of the Circuit Court of the United States for the District of South Dakota.*

UNITED STATES OF AMERICA,
*Eighth Judicial Circuit, District of South Dakota,* } *ss:*

I do hereby return due and perfect obedience to the within writ and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

Witness my hand as clerk and the seal of said court. Issued at office, in Sioux Falls, this 1st day of July, A. D. 1891.

O. S. PENDAR, *Clerk.*

188 [Endorsed:] Circuit court of the United States, district of South Dakota. Victor Dorne *vs.* Richmond Silver Mining Company. Writ of error (d'f'd't). Filed May 30th, 1891. O. S. Pendar, clerk.

189 United States Circuit Court, District of South Dakota.

VICTOR DORNE, Plaintiff and Respondent,
*vs.*
THE RICHMOND SILVER MINING COMPANY, Def't and App'l't.

UNITED STATES OF AMERICA, } ss:
*District of South Dakota,* }

Whereas on the 25th day of May, 1891, in the United States circuit court within and for the district of South Dakota, the above-named respondent recovered a judgment against the above-named appellant for the sum of eight thousand eight hundred & twenty-three & $\frac{96}{100}$ dollars; and whereas

The above-named appellant, feeling aggrieved hereby, intends to appeal therefrom to the Supreme Court of the United States, now, therefore,—

We do hereby undertake that the said appellant will pay all costs and damages which may be awarded against it in said appeal or on a dismissal thereof, not exceeding $250, and do also undertake that if the said judgment so appealed from or any part thereof be affirmed, or said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant in said appeal.

Dated this 27th day of May, 1891.

RICHMOND SILVER MINING CO.,
By VAN CISE & WILSON, *Att'ys.*
SOL. STAR.
D. A. McPHERSON.
JULIUS DEETKEN.
ENOS LANE.

190 STATE OF SOUTH DAKOTA, } ss:
*County of Lawrence,* }

On this 27th day of May, A. D. 1891, before me, the subscriber, appeared Sol. Star, D. A. McPherson, Julius Deetken, and Enos Lane, to me personally known to be the same persons who are described in and who executed the above undertaking, and severally acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and seal the day and year above written.

[NOTARIAL SEAL.] JOHN R. JONES,
*Notary Public.*

STATE OF SOUTH DAKOTA, } ss:
*County of Lawrence,* }

Sol. Star, D. A. McPherson, Julius Deetken, and Enos Lane, being severally sworn, each for himself and not one for the other, says that he is a resident and freeholder in the county of Lawrence, in

the State of South Dakota, and that he is worth the sum of ten thousand dollars over and above his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

SOL STAR.
D. A. McPHERSON.
JULIUS DEETKEN.
ENOS LANE.

Subscribed and sworn to before me this 27th day of May, 1891.
[NOTARIAL SEAL.] JOHN R. JONES,
*Notary Public.*

191 Upon the back of said supersedeas bond endorsement- appear in words and figures following, to wit:

In the U. S. circuit court. Victor Dorne *vs.* Richmond Silver Mining Co. Supersedeas bond. I hereby certify the within bond to be sufficient & approve the same. May 30, '91. A. J. Edgerton, judge. Filed May 30th, 1891. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, } ss:
*Eighth Judicial Circuit, District of South Dakota,* }

I, Oliver S. Pendar, clerk of the circuit court of the United States for the district of South Dakota, in the eighth circuit, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Sioux Falls, in said district, this 1st day of July, A. D. 1891.
OLIVER S. PENDAR, *Clerk.*

192 [Endorsed:] Victor Dorne, pl'ff and respondent, *vs.* Richmond Silver Mining Company, def't and app'l't. Certified copy of supersedeas bond from U. S. circuit court, dist. South Dakota.

193 UNITED STATES OF AMERICA, } ss:
*State of South Dakota, County of Lawrence,* }

W. B. Dwinnell, being duly sworn, says: He is over 19 years of age and a clerk in the office of Van Cise & Wilson, attorneys for the Richmond Silver Mining Company; that on the 20th day of June, 1891, he served the annexed citation on Messrs. Martin & Mason and Moody & Washabaugh, attorneys for Victor Dorne, defendant in error, mentioned therein, by delivering to and leaving with N. T. Mason, a member of the firm of Martin & Mason, a true copy thereof at his office, in Deadwood, Lawrence county, South Dakota, and also by delivering to and leaving with Frank J. Washabaugh, a member of the firm of Moody & Washabaugh, a true

copy thereof at his office, in Deadwood, Lawrence county, South Dakota.

W. B. DWINNELL.

Subscribed and sworn to before me this 20th day of June, 1891.

[Seal John R. Jones, Notary Public, South Dakota.]

JOHN R. JONES,
*Notary Public.*

194 UNITED STATES OF AMERICA, *sct.:*

To Victor Dorne, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of South Dakota, wherein The Richmond Silver Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

A. J. EDGERTON, *Judge.*

195 [Endorsed:] United States circuit court, district of South Dakota. Victor Dorne *vs.* Richmond Silver Mining Company. Citation. Filed May 30th, 1891. O. S. Pendar, clerk. Returned and refiled this 22nd day of June, A. D. 1891. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, }
*District of South Dakota,* } *ss:*

We hereby acknowledge due service of the within citation this twentieth day of June, A. D. 1891.

MARTIN & MASON &
MOODY & WASHABAUGH,
*Attorneys for Defendant in Error.*

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the district of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Victor Dorne, plaintiff, and The Richmond Silver Mining Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Victor Dorne, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done

to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 30th day of June, A. D. 1891.

O. S. PENDAR,
*Clerk of the Circuit Court of the United States for the District of South Dakota.*

197 DISTRICT OF SOUTH DAKOTA, *ss:*

I, O. S. Pendar, clerk of the United States circuit court for the district of South Dakota, do hereby acknowledge due service of this writ by a true and correct copy of the same, and do hereby accept due and lawful service of said writ this 30th day of June, A. D. 1891, and file the same in my office this day.

O. S. PENDAR,
*Clerk of the Circuit Court of the United States for the District of South Dakota.*

UNITED STATES OF AMERICA,
*Eighth Judicial Circuit, District of South Dakota,* } *ss:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

Witness my hand as clerk and the seal of said court. Issued at office, in Sioux Falls, this 1st day of July, A. D. 1891.

O. S. PENDAR, *Clerk.*

198 [Endorsed:] U. S. circuit court, district of South Dakota. Victor Dorne *vs.* Richmond Silver Mining Company. Writ of error (pl'ff). Filed June 30th, 1891. O. S. Pendar, clerk.

199 UNITED STATES OF AMERICA, *ss:*

To Richmond Silver Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of

error filed in the clerk's office of the circuit court of the United States for the district of South Dakota, wherein Victor Dorne is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered in the said circuit court of the United States in and for the district of South Dakota, in the case of Victor Dorne *vs.* Richmond Silver Mining Company, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of July, in the year of our Lord one thousand eight hundred and ninety-one.

ALFRED O. THOMAS, *Judge.*

Service admitted, by copy, at Deadwood, S. D., this 23d day of July, 1891.

VAN CISE & WILSON,
*Att'ys for Def't.*

200 [Endorsed:] Victor Dorne *vs.* Richmond Silver M. Co. Citation. Filed July 23rd, 1891. O. S. Pendar, clerk. Martin & Mason, att'ys for pl'ff.

201 At a session of the circuit court of the United States for the district of South Dakota continued and held, pursuant to adjournment, at the United States court-room, in the city of Deadwood, on the 23rd day of July, A. D. 1891, the Honorable Alfred D. Thomas being present and presiding in said court, the following, among other, proceedings were had and done, to wit:

VICTOR DORNE
*vs.*
THE RICHMOND SILVER MINING COMPANY.

By consent of counsel, in open court, the clerk is instructed to file the plaintiff's assignment of errors "*nunc pro tunc*" as of date June 30th, 1891.

UNITED STATES OF AMERICA,
*Eighth Judicial Circuit, District of South Dakota,* } ss:

I, O. S. Pendar, clerk of the circuit court of the United States for the district of South Dakota, do hereby certify that the above and foregoing is a true copy of an order entered upon the journal of the proceedings of said court in the cause therein entitled; that I have compared the same with the original entry of said order and it is a true transcript therefrom and of the whole thereof.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

Witness my official signature and the seal of said court, at Sioux Falls, in said district, this 3rd day of August, A. D. 1891.

O. S. PENDAR, *Clerk.*

202 [Endorsed:] Victor Dorne, pl'ff and appellant, *vs.* Richmond Silver Mining Company, d'f'd't and respondent. Tran-

script of record as to order to file assignment of errors "*nunc pro tunc.*"

203 In the United States Circuit Court, District of South Dakota.

VICTOR DORNE, Plaintiff and Appellant,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Respondent.
} Assignment of Errors.

Now comes the plaintiff and appellant, by his attorneys, and says there is manifest error upon the face of the record, committed by this court in the hearing and determination of this action, in this:

I.

The court erred in its order of September 5th, 1890, refusing to remand this case to the State court, to wit, the supreme court of of the State of South Dakota, for hearing and determination.

II.

The court erred in taking and retaining jurisdiction of this case.

III.

The court erred in its order dated May 25th, 1891, in reversing this case unless this plaintiff and appellant should file remittitur of one-half ($\frac{1}{2}$) the amount of the judgment recovered in the court below.

IV.

The court erred in requiring in its order of date May 25th, 1891, that this plaintiff and appellant should remit any portion of the judgment recovered by him in the court below.

V.

The court erred in not affirming the judgment of the court below.

204 VI.

The court erred in rendering its judgment of date May 25, 1891, for but half of the judgment of the court below.

VII.

The court erred in not rendering and entering judgment in favor of this plaintiff and appellant and against the defendant and respondent for the full amount of the judgment recovered in the court below upon an affirmance thereof.

Wherefore, for the errors aforesaid, the plaintiff and appellant respectfully asks for a reversal of the judgment entered by this

court on May 25th, 1891, and that in lieu thereof a judgment of affirmance be entered of the judgment of the court below.

MARTIN & MASON,
MOODY & WASHABAUGH,
*Attorneys for Plaintiff and Appellant.*

(Endorsed on back:) In the U. S. circuit court. Victor Dorne *vs.* Richmond Silver M. Co. Assignment of errors. Martin & Mason, attorneys for plaintiff. Filed July 23rd, 1891, as of June 30th, 1891, as by order of court. O. S. Pendar, clerk.

205 UNITED STATES OF AMERICA, } *ss:*
*Eighth Judicial Circuit, District of South Dakota,* }

I, O. S. Pendar, clerk of the circuit court of the United States for the district of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Sioux Falls, in said district, this 3rd day of August, A. D. 1891.

O. S. PENDAR, *Clerk.*

206 [Endorsed:] Victor Dorne, pl'ff and appellant, *vs.* Richmond Silver Mining Company, d'f'd't and respondent. Certified copy of assignment of errors.

207 UNITED STATES OF AMERICA, } *ss:*
*District of South Dakota,* }

In the United States Circuit Court, District of South Dakota.

VICTOR DORNE, Plaintiff and Appellant,
*vs.*
RICHMOND SILVER MINING COMPANY, Defendant and Respondent. }

Whereas, on the 25th day of May, A. D. 1891, in the United States circuit court within and for the district of South Dakota, judgment was rendered reversing the judgment of the court below in favor of the plaintiff and against the defendant, unless the plaintiff should file a remittitur for one-half ($\frac{1}{2}$) the amount of said judgment, and

Whereas the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the Supreme Court of the United States:

Now, therefore, we do hereby undertake that the said appellant, Victor Dorne, will pay all costs and damages which may be awarded against him on said appeal or on a dismissal thereof, not exceeding two hundred and fifty dollars ($250.00).

Dated as of the 30th day of June, A. D. 1891.

VICTOR DORNE,
By MARTIN & MASON, *His Att'ys.*
SEBASTIAN KOENIGSBERGER.
JOHN WRINGROSE.

STATE OF SOUTH DAKOTA, } ss:
*County of Lawrence,* }

Be it remember- that on this 22 day of July, A. D. 1891, before me, a notary public within and for said county and State, personally appeared the above-named persons, well known to me
208 to — the persons who executed the foregoing instrument, and duly and severally acknowledged to me that they executed the same.

Witness my hand and official seal this 22 day of July, A. D. 1891.

[NOTARIAL SEAL.] FRANK E. ICKES,
*Notary Public.*

STATE OF SOUTH DAKOTA, } ss:
*County of Lawrence,* }

Sebastian Koenigsberger, John Wringrose, being severally sworn, each for himself and not one for the other, says: He is a resident and freeholder of the county of Lawrence and State of South Dakota; he is worth the sum of five hundred dollars ($500.00) over and above his debts and liabilities and exclusive of property exempt from levy and sale on execution.

Subscribed and sworn to before me this 22 day of July, A. D. 1891.

[NOTARIAL SEAL.] FRANK E. ICKES,
*Notary Public.*

(Endorsed on back:) In the U. S. circuit court. Victor Dorne *vs.* Richmond Silver M. Co. Approved July 23rd, 1891, Alfred D. Thomas, judge. Undertaking. Filed July 23rd, 1891. O. S. Pendar, clerk. Martin & Mason, attorneys for plaintiff.

209 UNITED STATES OF AMERICA, } ss:
*Eighth Judicial Circuit, District of South Dakota,* }

I, O. S. Pendar, clerk of the circuit court of the United States for the district of South Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original.

Seal Circuit Court of the United States, District of South Dakota, Sioux Falls.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Sioux Falls, in said district, this 3rd day of August, A. D. 1891.

O. S. PENDAR, *Clerk.*

210 [Endorsed:] Victor Dorne, pl'ff and appellant, *vs.* Richmond Silver Mining Company, d'f'd't and respondent. Certified copy of undertaking.

Endorsed on cover: Case No. 14,731. South Dakota C. C. U. S. No. 220. The Richmond Silver Mining Company, plaintiff in error, *vs.* Sebastian Koenigsberger, administrator of Victor Dorne, deceased. Filed July 10, 1891. Case No. 14,795. No. 260. Sebastian Koenigsberger, administrator of Victor Dorne, deceased, plaintiff in error, *vs.* The Richmond Silver Mining Company. Filed August 11, 1891.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

No. 260.

SEBASTIAN KOENIGSBERGER, ADMINISTRATOR OF THE ESTATE OF VICTOR DORNE, DECEASED,
Plaintiff in Error.

vs.

THE RICHMOND SILVER MINING COMPANY,
Defendant in Error.

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT.

This action was brought by Victor Dorne against the Richmond Silver Mining Company in the district court of Lawrence County, Territory of Dakota, in the month of December, 1883. The suit is to recover damages for an alleged breach of contract to deliver certain mining stock in payment of mining property deeded to the Company. At the commencement of the action, the plaintiff, Victor Dorne, was a resident and citizen of the Territory of Dakota, and the defendant corporation was organized under the laws of the State of New York, transacting business in the Territory of Dakota by consent of its laws. The case was tried in the district court of Lawrence county, before a jury, in the month of April, 1889, and verdict rendered in favor of plaintiff, Dorne, and against the defendant, and judgment entered thereon on April 15th, 1889, for $15,375.75 (Record page 116). The defendant corporation appealed from the judgment of the district court of Lawrence County to the supreme court of the Territory of Dakota in the month of October, 1889, and the cause was pending on appeal in the supreme court of the Territory of Dakota at the time of the admission of South Dakota as a state, on November 2d, 1889. The case thereupon passed into the supreme court of the State of South Dakota.

At the February term, 1890, of that court the defendant filed a written request or petition for transfer of the cause from the supreme court of the state to the circuit court of the United States for the district of South Dakota. The ground alleged for the transfer was set forth in the petition as follows: "That your petitioner was at the time of the bringing of this suit, and still is a citizen of the State of New York, and that the said plaintiff was then a citizen of that portion of the Territory of Dakota which is now the State of South Dakota, and still is a citizen of South Dakota, and that the controversy in said action was and is wholly between said plaintiff and defendant" (Record p. 133). The transfer was granted over the objection of the plaintiff, and the record taken to the circuit court of the United States for the district of South Dakota. Counsel for plaintiff, Dorne, then moved to remand the case to the supreme court of the State upon the ground that the case had been improperly transferred and was not a cause of which the Federal court could take jurisdiction (Record p. 138). The motion to remand was argued before the circuit court and denied September 5th, 1890, and exception taken by counsel for Dorne, and allowed (Record pp. 145, 146). The opinion of Judge Edgerton in denying the motion to remand appears in the Record at page 146.

The circuit court of the United States for the district of South Dakota, District Judges Edgerton and Shiras presiding, then proceeded to try the case as a court of appeals at Sioux Falls, in the eastern division of the district of South Dakota, on the 6th, 7th and 8th days of November, 1890. The court sat as a court of review of the record made in the district court of Lawrence County, Dakota Territory, and considered the alleged errors raised by the appeal of the defendant to the supreme court of the Territory from the judgment, and order of the trial court overruling the defendant's motion for a new trial. As a result of this hearing the circuit court announced its opinion that reversable error had been committed in the trial court upon the question of damages (Record p. 154), and ordered that the judgment of the trial court be reversed unless the plaintiff should file a remittitur for one half of the original judgment, in which event the judgment should be affirmed for one-half of the amount with interest (Record pp. 151, 152). The remittitur was filed, and on May 25th, 1891, the circuit court rendered judgment for $8,823.96, being one-half of the original judgment and interest; to which order and judgment of the circuit court both parties, plaintiff and defendant excepted, (Record pp. 155, 156). Thereupon this writ of error was issued on behalf of the plaintiff, Dorne, to the circuit court of the United States, for the district of South Dakota, pursuant to petition filed on his behalf June 30, 1891. The original plaintiff, Victor Dorne, died intestate in the month of January, 1892, and the present plaintiff, his admininistrator, has been substituted by proper proceedings in this court.

## SPECIFICATION OF ERRORS.

We urge two errors upon the attention of the court:

I.

*The circuit court erred in assuming jurisdiction of this cause.*

This question is covered by plaintiff's assignment of errors Nos. 1 and 2 (Record p. 166), and was presented to the court by the motion to remand (Record pp. 138, 145). The case does not involve any federal question. Jurisdiction was assumed by the circuit court solely upon the ground stated in defendant's petition for transfer, that the defendant "was, at the time of the bringing of this suit, andstill is a citizen of the State of New York, and that the said plaintiff was then a citizen of that portion of the Territory of Dakota, which is now the State of South Dakota, and still is a citizen of South Dakota" (Record p. 133).

At the October term, 1891, of this court, the plaintiff, Dorne, moved to dismiss the writ of error issued in this case upon petition of the defendant, upon the ground that the circuit court had no jurisdiction of the cause. Defendant's counsel in their brief in resistance, took the position that the question was prematurely raised by motion, and that in good practice it should be held until the argument of the case before this court on the merits. The motion was denied by the court, but no opinion filed; from which facts we have taken it for granted that the court approved the position taken by defendant's counsel, and has held the question of jurisdiction open to be presented at this final hearing.

II.

*The circuit court erred in its conclusion that the district court of Lawrence County, Dakota Territory, had committed error upon the question of damages, and in refusing to affirm the judgment of the court unless one-half of the amount should be remitted.*

This point is covered by plaintiff's assignment of errors, Nos. 3 to 7 inclusive (Record p. 166). The court's conclusion appears in the bill of exceptions on page 154 of the record, and is the basis of the court's order for judgment (Record pp. 151, 152). An exception to this order on plaintiff's behalf is allowed at the end of the judgment of the circuit court (Record p. 156).

In order to properly consider this question, it will be necessary to produce here the entire record of the trial court upon the question of damages. We have selected such portions from the record, and wherever objection was made or exception saved by the defendant corporation, such fact is noted.

The complaint alleges upon the subject of damages. "Plaintiff further alleges that the value of said stock, the consideration of said sale and conveyance as aforesaid, and which was thus fully paid for, is, and was at the time when it was so as aforesaid agreed to be delivered and has at all times since been, of the value of more than fifteen thousand (15,000) dollars, and this plaintiff has been damaged

by the defendant's failure to transfer and deliver such shares of stock as agreed to be delivered as aforesaid in the sum of more than fifteen thousand (15,000) dollars, and there is now due and owing from the said defendant to the said plaintiff, by reason of the premises aforesaid, the full and just sum of fifteen thousand ($15,000) dollars.

Wherefore plaintiff demands judgment against said defendant for the sum of fifteen thousand ($15,000) dollars, and interest and the costs of this action." (Record p. 3). The defendant answers: "Denies any knowledge or information sufficient to form a belief as to the value of the shares of said stock which the complaint alleges the defendant agreed to deliver to the plaintiff." (Record p. 4).

Witness Victor Dorne plaintiff, direct examination, April 10th, 1889:

"Q. 127. Have you dealt in mining stocks?

A. Oh, not very extensively; I frequently purchased stocks to hold.

Q. 128. Are you able to state what the market value of this Richmond stock was during that period, say in January and February, 1883?

Objected to.

By the court: Are you acqnainted with the market value of this stock at that time?

A. Yes, sir, I was.

By same: Say whether you were acquainted with it or not.

A. Yes, sir, I was.

Q. 129. What was the market value of this stock of the Richmond Silver Mining Company at that time at Deadwood or any other point where it was held?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Plaintiff excepts.

Q. 130. Do you know where the Richmond Silver Mining Company's stock was held at that time, say February, 1883?

A. Held in New York.

Q. 131. Sir?

A. Chiefly held in New York.

Q. 132. Some of it held here?

A. Yes, sir.

Q. 133. Whereabouts?

A. I know of two men who had it, but outside of them I could not say.

Q. 134. Who were they?

A. They were Mr. Kyte and Mr. Pennywell.

Q. 135. And where were they living?

A. They were living at Galena.

Q. 136. Where was it held?

A. Where was the stock held?

Q. 137. Yes, sir.

A. They owned the stock. I don't know just where they had it. I presume they had it in their own hands.

Q. 138. Was there some held in Chicago?

A. Yes, sir.

Q. 139. Did you make any effort to purchase the property of Kyte and Pennywell?

A. A portion of it; yes, sir.

Q. 140. Did you offer them a price for their stock?

A. Yes, sir.

Objected to. Objection sustained. Plaintiff excepts.

Q. 141. Do you know of any being on the market here in Deadwood?

A. Very little; I think there was some.

Q. 142. What was it held at—what was the market value?

A. In Deadwood?

Q. 143. Yes, sir?

By Mr. VanCise: In February, 1883?

A. The market value was over a dollar.

Q. 144. How much was held there?

A. I don't think there was a great deal held in town; I could not say how much.

Q. 145. About how much?

A. I don't think there was ten thousand shares in Deadwood at that time.

Q. 146. What did Kyte and Pennywell ask for theirs?

Objected to. Objection sustained. Plaintiff excepts.

Q. 147. Now, then, you may state what was the least price which this property could be procured at—this stock—per share in this vicinity?

A. I was refused fifteen hundred shares at one dollar a share.

By the court: Do you know? Not what you were refused at.

A. One dollar a share.

By the court: That is the least price it could be bought at in the market?

A. Yes, sir.

Q. 148. You may state whether you made an effort to purchase the property—this stock—at the time, and, if so, what was asked you for it?

Objected to.

Q. 149. What was the lowest price at which you could get an offer?

Objected to.

By the court. You may state what was the lowest price which you could get it for in this market.

A. Two dollars a share." (Record pp. 21, 23.)

Cross-examination.

Q. 155. Now, as to the value of this stock—the stock was to be delivered to you in three months; was it within three months?

A. There was no time mentioned at all. I think there was three months mentioned there; I may have said three weeks; that is my recolleetion of it, but there was no time mentioned; it was simply a reasonable time—immediately after he got back. It was distinctly understood there was nothing for him to do except to get my stock, my one-seventh of two-thirds of the stock, and send it to me or have the deed made back to me.

Q. 156. Mr. Scrymser, then, did agree that if he did not make a satisfactory arrangement for you that he would send the—give you the title back again?

A. Yes, sir.

Q. 157. Now, this deal was made in December, 1882. What time are you fixing for the valuation of this stock which you have been naming here?

A. It was sometime after; I cannot say just how long.

Q. 158. Well, about how long?

A. I cannot name any time. It was during the year.

Q. 159. During what year?

A. During the year 1882.

By the court: 1882 or 1883?

A. 1883.

By same: Didn't yon say it was during the month of February?

A. I received the deed on the 31st, 1881.

By same: You mean stock?

A. I received the stock.

By same: I am not asking you when you received it; but you testified as to the value of that stock during 1883. What time during 1883 do you mean, February?

A. No, sir. It was not in February; it was sometime during that month. My negotiations were to be carried on in New York. I had to sell it there.

By same: You do not understand me, I do not think. You have testified here on direct examination as to the value of the stock of that mining company during the month—or in the year 1883—and you said it was worth at least two dollars. Now, what time did you mean?

A. I meant during the year; not exactly at that time. I did not mean it immediately upon receipt of my stock. I meant that during the year 1883. It was that same year, and, I think, it was during the summer—about June, 1883— two or three months after I had it.

Q. 160. At the time when you received this stock, in February, was there any stock here on the market in Deadwood for sale?

A. I don't know

Q. 161. Did you make any enquiries for any?

A. I did not.

Q. 162. Now, as near as you can, how soon after you received this stock in February were you advising yourself as to the market value of the stock here?

A. Within sixty days after that; probobly the 1st of May.

Q. 163. Were you in the market trying to buy it?

A. Yes, sir, I had given orders to buy it.

Q. 164. Was there any here on the market.

A. I don't know, sir.

Q. 165. You don't know of that stock being sold here on the market during or within sixty days from the time you received the stock, do you?

A. No, sir; I do not.

Q. 166. As a matter of fact, up to, say the first of September, 1883, do you know of a share of that stock being for sale here in Deadwood on this market?

A. No, sir.

(Record pp. 35, 36.)

Re-examination.

Q. 1. Where was the stock held that you tried to purchase?

A. It belonged to the two parties, Kyte and Pennywell.

Q. 2. Where held? Where did they live?

A. They lived at Galena, Dakota.

Q. 3. And it was there you made the effort?

A. Just as I have stated.

Q. 4. Made the offer?

A. And I made the offer.

(Record p. 36.)

Q. 39. Was treasury stock upon the market in New York during this season?

A. Not that I know of.

Q. 40. Don't know whether any of it was sold or not?

A. I do not, sir.

(Record p. 39.)

Q. 1. Was there any stock on the market except this Kyte and Pennywell stock nearer than Chicago during the months of January, February and March and April, 1883?

A. No. sir; not that I know of.

(Record p. 39.)

Q. 2. Now, upon the subject of the value of this stock, was there any stock in this market during the winter and spring of 1883 to the amount of ten thousand two hundred and eighty-five shares?

A. No, sir.

Q. 3. When did these people, Kyte and Pennywell, or about when, did they get their stock?

A. At the time I approached them was about Jnne.

Q. 4. What part of June?

A. They had spoken to me before they told me that they had —they told me that they had their stock.

Objected to.

Q. 5. Was there any other stock except what you had, that 3,500 shares, and theirs in this country at that time?

A. I do not think there was. There was none on the market; that is positive.

Q. 6. And what did they offer it to you for?

Objected to as incompetent, immaterial, irrelevant, and also for the further reason that the enquiry is not directed to the class of property in controversy in this action. Objection sustained. Plaintiff excepts.

By the court: He can state if he know—where there have been considerable transactions in it, what it brought in the market, but he cannot state individual instances.

Q. 7. You may state then what this Richmond Silver Mining Company's stock was worth at the time when it should have been under your contract delivered to you?

A. He was here in business—engaged in speculating in stocks and buying. I do not recollect his first name—John.

Q. 10. He was familiarly called Jack?

A. Yes, sir.

Q. 11. Was he in partnership as a broker with Mr. McDonough?

A. I do not recollect at that time. I only knew him.

Q. 12. Don't you know as a matter of fact that Mr. Cranston was not in the stock broking business until for a year or so after that until about March, 1886?

A. He represented himself so to me.

Q. 13. He did?

A. Yes, sir. In other words, he had bought stock from me before this.

Q. 14. How much of the stock did you order through them?

A. Sir?

Q. 15. How much of the stock did you order through them?

A. Just what they could buy up to fifteen hundred shares.

Q. 16. At what price?

A. At a dollar a share.

Q. 17. This was in June?

A. Yes, sir; I will set the time at that as near as I can arrive at it at this time.

Q. 18. You did not get it, did you?

A. I did not; no sir.

Q. 19. It was not in this market at that time, was it?

A. It was not where I could get at it.

Q. 20. Now, Gaston—you also ordered some through him?

A Yes, sir.

Q. 21. How much did you order through him?

A. Whatever he could buy up to; I gave him a good limit.

Q. 22. Mention the limit?

A. I cannot mention it. I gave him a limit so that I would not get over fifteen hundred shares.

Q. 23. Did you mention any number of shares?

A. I think I did.

Q. 24. What did you mention?

A. I cannot mention the number; what I had in view was fifteen hundred shares.

Q. 25. Did you authorize Mr. Gaston to purchase for you at least fifteen hundred shares?

A. He could purchase it and I would be present at the time.

Q. 26. At what price?

A. One dollar.

Q. 27. Did he get it for you?

A. He did not.

Q. 28. It was not in the market, was it?

A. I don't know. I did not get it from him.

Q. 29. You also tried to procure it through Mr. Howsley?

A. Howsley.

Q. 30. Where was his office then?

A. I do not recollect, I am sure.

Q. 31. Was he a stockbroker here?

A. He did deal in stocks, yes, sir.

Q. 32. Was he buying and selling stocks as a broker?

A. Well, as to what his business was aside from what he agreed to do for me is what I don't know.

Q. 33. Then you don't know whether he was dealing in stocks or not?

A. I don't know.

Q. 34. Now, did you go to Cranston's office?

A. No, sir, I saw him on the street.

Q. 36. Did you go to Howsley's office?

A. No, sir.

Q. 37. How much stock did you authorize Mr. Howsley to buy?

A. I told him—I don't know as I mentioned the number of shares, but in all those to whom I--from whom I wanted to get me some.

Q. 38. That is very important.

A. But I could easily be informed at an hour's notice, and if they could get hold of any I was to be present to take it.

Q. 39. Did you agree with these brokers that if they should bring to you or report to you that they could find fifteen hundred shares of this stock that you would give them twenty-two hundred and fifty dollars, or fifteen hundred dollars?

A. Whether I stated the number of shares to each one or not I do not know. I wanted the stock and it was none of their business until they got it.

Q. 40. Did you state to any of these brokers that they could procure for you fifteen hundred shares of this stock and you would take it?

A. As to the exact number of shares and explaining to each one that I wanted fifteen hundred shares, I say no; I did not.

Q. 41. Did you, to any one of these three gentlemen whom you have named, authorize them, any of them, either of them, to buy for you fifteen hundred shares of this stock?

A. There was no authority on them to buy it. I was to buy it; they were to look for the stock.

Q. 42. Then you did not agree with any of these gentlemen in case they found this stock to take it?

A. I did.

Q. 43. And you agreed with them if they found you not exceeding fifteen hundred shares you would take it at how much a share?

A. That was the limit—fifteen hundred shares, one dollar a share.

Q. 44. And you agreed to take that amount in case they found it, did you, at that price?

A. I did not bind myself to them that I would take fifteen hundred shares—that is what I had sold and received the money for.

Q. 45. You did not bind yourself to those gentlemen to take any number, any definite number, of shares at that price, did you?

A. No; I did not bind myself at all. It was an order.

Q. 46. Wasn't that sort of a roving commission which you gave those gentlemen, to ascertain whether or not they could find in this country any Richmond stock?

A. Not that I know of. I have done it a dozen times since.

Q. 47. Now, you mentioned that you had had this stock and a sum in addition sold in New York; when was it that you had it sold?

A. About during the same period.

Q. 48. Did you make any further attempts after these experiences with these three brokers to buy stock in this market?

A. Yes, sir; in the meantime I was informed by Kyte or Pennywell, or both of them, that they had sold out, and would sell more stock easily at prices three or four dollars a share, I understood.

Q. 49. That they had sold out. Then how much stock was it that you had sold in New York?

A. Five thousand shares.

Q. 50. That included that 3,500?

A. Yes, sir.

Q. 51. And it was for the purpose of filling that order you were trying to get that other fifteen hundred shares, was it?

A. Yes, sir.

Q. 52. And you had sold the stock in New York for how much?

A. For one dollar and a half a share.

Q. 53. To whom?

A. It was sold through friends of mine there; parties I did not know. I received the money in draft.

Q. 54. You have not got that draft?

A. No, sir; I have not.

Q. 55. Did you return the money?

A. When I found I could not get the other fifteen hundred shares of stock, why, the deal was off.

Q. 56. Will you give the name of the party that sent you the draft?

A. It was a draft from a broker's office or a bank. I do not recollect the party. I do not know who the individual was that sent me the draft; no sir.

Q. 57. Will you give the name of the party who made the sale for you?

By the court: Your friend you speak of.

A. R. A. Marston.

Q. 58. Have you his postoffice address?

A. No, sir; I have not.

Q. 59. Did you ever have it?

A. Yes, sir.,

Q. 60. How long since you had it?

A. It is—New York somewhere.

Q. 61. Can you give it now?

A. I cannot.

Q. 62. Can you procure it for us?

A. Possibly I can.

Q. 63 Will you do so?

A. I will telegraph to New York, is the only way I know how to do it. If it can be got I will turn it over to you.

Q. 64. At what time was it when you received this draft?

A. It was during June.

Q. 65. After you received the draft what did you do with it?

A. I had it with me. I think I put it in Martin's or Van Cise and Wilson's safe.

Q. 66. What afterwards became of it?

A. I received it back from them at—

Q. 67. Do you say you received it back?

A. Yes, sir.

Q. 68. From Van Cise & Wilson?

A. Yes, sir.

Q. 69. Well, you are fortunate. To which one of the firm did you deliver it?

A. I do not recollect that, surely.

Q. 70. Was it either Van Cise or Wilson?

A. It was one or the other. I cannot recollect.

Q. 71. In June, 1883?

A. Yes, sir, in June, 1883.

Q. 72. You received it back; which one returned it?

A. I think it was John R. Wilson who returned it to me.

Q 73. Was there any letter with the draft stating what it was for?

A. Yes, sir.

Q 74. Was that letter deposited with the draft with Van Cise & Wilson?

A. Yes, sir.

Q. 75. Did Van Cise & Wilson know what that draft was?

A No, sir.

Q 76. In what shape was it when you delivered it to them?

A It was a large white envelope with my name upon it, and I had a letter in the envelope opened together with the draft on the inside

Q. 77 Had you any previous correspondence with the parties through whom this sale was made by which you were to furnish this stock?

A. Yes, sir, I knew him, I knew the party In fact I had received a letter making an enquiry in regard to it; said he knew I was—heard I was out here.

Q 78. That was seven thousand dollars, did you say?

A. Seventy-five hundred.

Q. 79. Thirty-five hundred shares?

A. Yes, sir; five thousand shares.

Q. 80 Now, you did not get the five thousand shares?

A. No, sir.

Q. 81. Did you return that draft?

A. Yes, sir; and the stock was returned. My stock had been sent on—the 3,500.

Q. 82. Now, could you at that time have sold the 3,500 at the same price?

A. Well, that I did is all that I know.

Q. 83. But could you have sold that 3,500 at the same price?

A. No, sir.

Q. 84. The party who purchased would take either five thousand or none?

A. Five thousand shares.

Q. 85. Or none?

A. Yes, sir.

Q. 86. The name of the purchaser you are not able to give?

A. No, sir.

Q. 87. Now, after this stock was returned to you—the 3,500 shares—did you make any subsequent efforts to sell that in New York, where the price was so high.

A. No, sir; I did not.

Q. 88. What did you do with it?

A. I retained it and sold it later on.

Q. 89. Where did you sell it?

A. It was sold here in Deadwood.

Q. 90. To whom was it sold?

A. I do not recollect the party.

Q. 91. Was it sold in a lump, all at once?

A. No, sir; it was not sold in a lump.

Q. 92. Divided up?

A. Yes, sir.

Q. 93. Did you sell it or did other parties sell it?

A. Other parties sold it.

Q. 94. How much was it sold for?

A. If I recollect, it was about seventy-five cents a share.

Q. 95. When?

A. Several years after that—several years after June, 1883.

Q. 96. How many years?

A. I don't know; I did not sell it.

Q. 97. Was it ten?

A. No, sir.

Q. 98. How many?

A. Several years; two years we will say—probably two years.

Q. 99. That would be 1885. You did not sell the stock yourself?

A. No, sir.

Q. 100. Did you get the proceeds?

A. I did.

Q. 101. Wasn't that stock divided into three parts, and two parts go to your counsel and you keep the other?

Objected to.

Q. 102. Did you deliver that stock—any portion of it—to other parties before it was sold, and did those other parties sell it?

A. It was my individual stock up to the time it was sold.

Q. 103. Will you answer that question as I asked it?

A. I did not carry the stock in my pocket; it was always in somebody else's possession.

Q. 104. Was the stock cut up?

A. Not that I know of.

Q. 105. Was it all in one certificate?

A. Not that I know of.

Q. 106 Was it all in one certificate?

A. I do not know, sir, I never saw it.

Q. 107. You never saw that 3,500 shares?

A. Yes, sir; I saw that 3,500 shares, but I never saw it cut up.

Q. 108. Was it all in one certificate?

A. It was when I saw it.

Q. 109. You never saw it in any other shape?

A. No, sir.

Q. 110. How do you know at what price it was sold?

A. I know what I received for it.

Q. 111. What did you receive?

A. Seventy-five cents a share, possibly.

Q. 112. Did you receive seventy-five cents a share for 3,500 shares or did other parties receive part of it?

A. If they did I paid it out.

Q. 113. I will ask you another question. In June, 1883, when you had bargained this stock in New York for a dollar and a half per share and failed to deliver and receive back the 3,500 shares, why didn't you make subsequent attempts to sell that 3,500 shares in New York at that price?

Objected to as incompetent, immaterial and calling for the expression of an opinion

Objection overruled Plaintiff excepts.

A. The proposition was made to me for the stock and I—after the deal was over I had no opportunity of looking around in New York for any—for selling it at all,

Q. 114. Did you make any enquiries or take any steps to ascertain whether you could dispose in New York of this 3,500 shares of stock or not?

A. I did not.

Q. 115. Was it with Mr. Kyte or with Mr. Pennywell with whom you talked about the Richmond stock?

A. I think it was Mr. Pennywell."

Plaintiff rests.

(Record pp. 43, 44, 45, 46, 47, 48 and 49.)

Witness Clarence H. Scrymser, for defendant. Direct examination:

"Q. 33. How many shares of that stock do you own individually or as trustee?

A. Between 19,000 and 20,000 shares.

Q 34. What price did you pay for so much as you purchased?

A. Fifty cents per share.

Q. 35. Has that stock ever had any market value?

A. It has sold at fifty cents per share."

(Record pp. 52 and 53.)

Following this the testimony of this witness was concluded at

some length, and witness, John R. Wilson, was sworn and examined on part of defendant, but not upon subject of damages. An adjournment was then taken until April 12th, 10 a. m., (Record page 53 to 57 inclusive) when the following proceedings were had:

"Friday a. m., April 12th, 1889.

Defendant now moves to strike out all the evidence of Victor Dorne, the plaintiff in this action, relating to the alleged negotiation or attempted negotiation for the sale of five thousand shares of the stock of the Richmond Mining Company, with a party in New York, and also the alleged efforts to buy stock in this market, with orders at a dollar a share, for the purpose of meeting such alleged sale or negotiation for sale.

Motion denied. Defendant excepts."

(Record p. 67.)

Witness John M. Mordock for defendant. Direct examination:

"Q. 29. Are you acquainted with the market value during that time of this stock there?

A. It had no market value there.

Q. 30. Why do you say that?

A. Simply because there was no stock on the market and because it was simply a piece of development work in which the ownership was represented in stock, the stockholders not desiring to sell any stock to anybody or put it on the market.

By the court: You say you are acquainted with the market value there, and there was no such stock on the market?

A. There was no such stock on the market—no stock offered.

By same. That is what you mean to say?

A. Yes, sir; it was development.

By the same. Do you know the value of this stock; what was the value of the stock there?

A. It had no value. We hoped to make it valuable by our development; that was actually the fact.

By same: You don't mean to say it was actually valueless?

A. I mean to say that we hoped to make it valuable.

By same: I mean didn't it have some value. Wasn't it worth something upon the market; wouldn't it have brought something upon the market?

A. I think if we had gone out and offered people that stock probably about two or three or four cents a share on chance. I don't know that it had any value at all. I don't think it had, probably."

(Record, p. 75.)

Instructions to jury:

Number seven at defendant's request *refused.*

"In this case the jury are instructed that if you believe from the evidence that the plaintiff is entitled to recover, then the measure of his damage will be the value of the stock in the defendant company which he should have received over and above the thirty-five hundred shares received by him. Such value is deemed to be the price at which plaintiff might have bought such stock in the market nearest to Deadwood at such time after he should have received such stock as would suffice, with reasonable dilligence, for him to pur-

chase the same, together with the interest thereon at 7 per cent per annum; and you are further instructed that there is no competent evidence as to the plaintiff's damages before you in this action unless it be the evidence of Mr. Mordock.

(To the refusal of the court to give which instruction the defendant at the time duly excepted.)"

(Record pp. 78 and 79.)

No.——At plaintiff's request *granted.*

* * * "then the plaintiff is entitled to recover from the defendant in this action the value of the difference between three thousand five hundred shares of the said stock and fourteen thousand two hundred and eighty-five and five-sevenths shares thereof, or ten thousand seven hundred and eighty-five and five-sevenths shares of the said stock, the said value to be estimated and determined as of such time after the said property was agreed to be delivered to the said plaintiff as would suffice, with reasonable dilligence, for the plaintiff to make a purchase of an equivalent of such stock in the market nearest to the place where you find the plaintiff ought to have been put in possession thereof, and at the price at which such stock might have been bought in said market, and interest at 7 per cent per annum upon the value of said ten thousand seven hundred and eighty-five and five-sevenths shares from the said time, and your verdict should be for the plaintiff accordingly.

(To the giving of which instruction the defendant at the time duly excepted.)"

(Record pp. 80 and 81.)

No. 6 at plaintiff's request *granted.*

* * * * "then the said plaintiff is entitled to recover from the said defendant the value of the number of shares to which he would be entitled under said agreement less what he has received, to-wit: he would be entitled to the value of 10,785 and five-sevenths shares, which value is to be estimated as follows: You are to take the price at which the plaintiff might have bought an equivalent number of like shares in the market nearest to the place where such shares ought to have been delivered to the plaintiff and at such time after a failure to so deliver according to such agreement as would suffice, with reasonable diligence, for the plaintiff to make a purchase of such number and like shares of said company, together with interest thereon from such time at the rate of seven per cent per annum.

(To the giving of which instruction the defendant at the time duly excepted.)"

(Record p. 82).

Number seven at plaintiff's request, *granted.*

"VII. If the jury find for the plaintiff in this action, in estimating the damages to which he will be entitled, the jury will take the price, as you find such price from the evidence in this case, at which the plaintiff might have bought an equivalent number of like shares to the possession of which you find he was entitled, and of which he has been deprived, in the market nearest to the place where, by the agreement between the parties, if you find such agreement, he ought to have been put in possession, and at such time after

the breach of duty by defendant as would have sufficed, with reasonable diligence, for the plaintiff to make such a purchase, together with interest on the amount thereof at the rate of 7 per cent per annum from such time.

(To the giving of which instruction the defendant at the time duly excepted.)"

(Record p. 82).

Verdict.

"In district court, first judicial district of the Territory of Dakota, in and for the County of Lawrence.

Victor Dorne, Plaintiff,
vs.
Richmond Silver Mining Company, Defendant.

We, the jury in the above entitled case, find for the plaintiff on all the issues and assess the plaintiff's damages at ($—) $15,315.70 dollars.

H. P. Cheairs, Foreman.

Deadwood, Dakota, April 13th, 1889."

(Record p. 116).

In defendant's notice of intention to move for a new trial defendant's counsel enumerated the following grounds for the motion among others:

"IV.

Excessive damages appearing to have been given under the influence of passion or prejudice.

(Record p. 84).

V.

Insufficiency of the evidence to justify the verdict in this—

9. There is no legal evidence of damages to justify or sustain the verdict.

(Record p. 85).

VII.

Error in law occurring at the trial and excepted to by the defendant in this:

5. The court erred in overruling the objection of defendant to direct interrogatory No. 149, addressed to this witness, and allowing the witness to answer the same and other like questions without showing that he was qualified or competent to make an answer thereto, and in allowing the defendant to answer other like questions, Nos. 142, 143, 147, and others, and testify to the market value of stock in the defendant company in Deadwood, where the same witness testified there was none of the stock for sale or on the market.

(Record pp. 85 and 86.)

6. The court erred in allowing this witness, upon his being recalled upon behalf of the plaintiff, to testify, in spite of defendant's prior objections to like questions, to the value of the stock in the defendant company in New York (see question 27) and in Deadwood,

based upon its alleged value in New York and the cost of getting it to Deadwood. (See question 9 and questions following upon the recall of this witness.)

(Record p 86.)

7. The court erred in allowing this witness to testify to an alleged contract for sale of stock to parties in New York (see questions No. 11, and following upon the recall of the witness) after having previously limited the testimony of value to the time when the stock should reach the defendant and directing witness not to testify as to offers he had made for stock or prices at which it had been refused him or any individual instances. (See question 6 and ruling immediately preceeding.)

(Record p. 86.)

12. The court erred in overruling the motion of the defendant to strike out all the evidence of Victor Dorne, the plaintiff in this action, relating to the alleged negotiations or attempted negotiations for the sale of 5,000 shares of stock of the Richmond Silver Mining Company with a party in New York, and also the alleged offers to buy stock in this market with orders at a dollar a share for the purpose of making such alleged sale or negotiating for sale.

(Record p. 86.)

16. The court erred in refusing the instruction offered on behalf of the defendant, No. 7.

(Record page 87.)

20. The court erred in giving, at the request of the plaintiff, his instruction No. 3.

(Record page 87.)

22. The court erred in giving, at the request of plaintiff, his instruction No. 6.

(Record page 87.)

23. The court erred in giving, at the request of plaintiff, his instruction No. 7."

(Record page 87).

Defendant's motion for new trial was overruled on September 11th, 1889 (record p. 115), judgment having been previously entered on the verdict (record p. 129).

The foregoing is the entire record in the trial court upon the subject of damages.

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## BRIEF OF ARGUMENT.

### I.

*The circuit court erred in assuming jurisdiction of this case.*

The determination of this question must turn upon the proper construction of the Act of Congress of February 22d, 1889, providing for the admission of South Dakota as a state. The provisions of that act applying to this question, are as follows:

"Section 21. That each of said states, when admitted as aforesaid, shall constitute one judicial district * * * * and the cir-

cuit and districts courts therefor shall be held * * * * and each of said districts shall for judicial purposes, until otherwise provided, be attached to the Eighth judicial circuit. * * * * There shall be appointed for each of said districts one district judge * * * * The circuit and district courts for each of said districts and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations."

"Sec. 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the supreme court of either of the Territories mentioned in this act or that may hereafter lawfully be prosecuted upon any record from either of said courts, may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the state succeeding the territory from which such record is or may be pending, or to the supreme court of such state, as the nature of the case may require; provided that the mandate of execution, or of further proceedings shall, in cases arising in the territory of Dakota, be directed by the Supreme Court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the state of South Dakota * * * * as the nature of the case may require. And each of the circuit, district and state courts herein named, shall, respectively, be the successor of the supreme court of the territory as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the territories mentioned in this act, in any case arising within the limits of any of the proposed states prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said state into the Union."

"Sec. 23. That in respect to all cases, proceedings and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of any of the territories mentioned in this act at the time of the admission of such territory into the Union, arising within the limits of said proposed state, the courts established by such state shall, respectively, be the successors of said supreme and dis-

trict territorial courts; and all the files, records, indictments and proceeedings relating to any such cases, shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the states mentioned in this act, shall be pending in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or state court, as the case may be. Provided, however, that in all civil actions, causes and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States except upon the written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts."

"Sec. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories or by Congress, are hereby repealed."

25 U. S. Stats., pp. 682, 683.

(a) **GENERAL PROPOSITIONS.**

The presumption is that a case is without the jurisdiction of the Federal court, unless the contrary appears.

Robertson vs. Cease, 97 U. S. 646, 649.
Grace vs. Ins. Co., 109, U. S. 276.

Appellate jurisdiction in the Federal courts depends on the constitution and acts of Congress; when these do not confer it, courts of the United States cannot exercise it by virtue of the agreement of counsel, or otherwise.

The Lucy, 8 Wallace, 307.

A citizen of a territory cannot sue a citizen of a state in the United States courts.

Hepburn vs. Ellzey, 2 Cranch 445.
New Orleans vs. Winter, 1 Wheat, 92.
Barney vs. Baltimore, 6 Wall, 280, 287.
Darst vs. Peoria, 13 Fed Reporter, 561.
Dillon Removal of Causes, Sec. 98 (5th Ed.)
Brooks vs. Baily, 9 Fed. Rep. 438.
Ames vs. Ry. Co., 4 Dillon, 260.
Sedden vs. Virginia Co., 36 Fed. Rep. 6-8.

This rule prevails from the reason that Congress has no power, under the Constitution, to provide that suits may be commenced in the Federal courts between citizens of a territory and citizens of a state; the power granted by the Constitution in that respect, being confined to controversies between citizens of different states.

U. S. Constitution, Art. 3, Sec. 2.
Hepburn vs. Ellzey, 2 Cranch 445.
New Orleans vs. Winter, 1 Wheat. 92.
Brooks vs. Baily, 9 Fed. Rep. 438.

A case begun in a territorial court cannot be transferred to a

Federal court of a new state after the admission by virtue of the removal acts.

Ames vs. Ry. Co. 4 Dillon 260.

(b) **FORMER LEGISLATION.**

In 1848 Congress attempted some general legislation upon the subject of the disposition of cases pending in the territorial courts at the time of the admission of states into the Union. This legislation is referred to by Justice Davis in Express Co. vs. Kountze, 8 Wall. 349, as follows:

"On the admission of a new state into the Union, it becomes necessary to provide not only for the judgments and decrees of the territorial courts, but also for their unfinished business. In recognition of this necessity, Congress, after Florida became a state, passed an act providing, among other things, that all cases of Federal character and jurisdiction pending in the courts of the territory be transferred to the district court of the United States for the District of Florida. The provisions of this act were made applicable at the time of its passage to cases pending in the courts of the late Territory of Michigan, and were afterwards extended to the courts of the late Territory of Iowa. Congress in making this provision for the changed condition of Iowa, thought proper in the same act to adopt a permanent system on this subject, and extend the provisions of the original and supplementary acts to cases from all territories which should afterwards be formed into states."

The legislation referred to by Justice Davis in the above case is an act of Congress approved February 22. 1847, found in 9 U. S. Stat. at Large, 128, and an act of Congress approved Feb. 22, 1848, found in 9 U. S. Stat. at Large, page 211 and 212. These acts provided in plain terms that all cases and proceedings of Federal character or jurisdiction pending "at the time of the admission" of the state into the union should be transferred to the Federal courts of the United States. By these acts the test of the Federal character of the case, entitling it to transfer to the Federal court is plainly placed as of "the time of admission" of the state into the Union. These acts contained the general law upon this subject until the publication of the Revised Statutes in 1878. The Revised Statutes of 1878 have incorporated some of the features of these acts of 1847 and 1848 into the statutes in sections 567, 568, 569 and 704; although the direct provisions of these acts providing that cases of Federal character at the time of the admission of a state might be transferred to the Federal courts are omitted from the Revised Statutes. While these acts of 1847 and 1848 were in force two cases arose upon the admission of the territory of Nebraska into the Union. One of these cases is the case of the Express Company vs. Kountze, 8 Wallace, 342, which is above referred to. In this case the question of jurisdiction of the circuit court of the United States was raised, and as the parties, plaintiff and defendant, upon the admision of the State of Nebbraska into the union became citizens of different states, it was considered that the case was of Federal character and that the Federal court had jurisdiction. The other case is Baker vs. Morton, 12

Wallace, 150. There the question of jurisdiction does not seem to have been raised, but it is simply stated that as the complainant was a citizen of the state of Nebraska, and the defendant a citizen of the state of New York, the case was transferred to the Federal court. This seems the necessary construction of the statute of 1847 and 1848; as there the provisions for transfer to the Federal court simply require that the cause should be of a Federal character upon the admission of the state into the Union, without regard to whether it were a case of Federal character at the time of the commencement of the suit or not.

In 1876 upon the admission of Colorado into the Union, an act was passed disposing of the cases that had been pending in the territorial courts of Colorado, which act was approved June 26th, 1876, and is found on page 61 of the Public Laws of the first session Forty-fourth Congress, chapter 147. This act made radical changes in the law for the distribution of unfinished court business so far as the Territory of Colorado was concerned, and is practically identical with Sects. 22 and 23 of our Enabling Act. The provisions of the Colorado act in relation to the question now before the court have not been judicially passed upon in any reported case. In the case of Ames vs. Ry. Co., 4 Dillon 251, in the circuit court of the United States for Colorado, in which application was made to docket the case in the circuit court upon the ground of diverse citizenship, the court held that as the parties had submitted to the jurisdiction of the state court, after the admission of the state into the Union, they had waived all right that they might otherwise have had to ask a transfer to the Federal court, and consequently the question as to whether the case was one of Federal jurisdiction was not passed upon. Practically the same situation existed in the case of Gaffney vs. Gillette, 4 Dillon 264. This was also a case where the parties submitted to the jurisdiction of the state court and so waived the question of right of transfer. The same case of Ames vs. Ry. Company was afterwards sought to be transferred to the circuit court of the United States under the general Removal Act, 4 Dillion, 260. This was denied upon the ground that the provision of the Removal Act, which permits the transfer of cases brought in "a state court," could not apply to cases brought in a territorial court. The only other case that seems to have arisen under the Colorado act is that of Bates vs. Payson, 4 Dillon 265. Here the question of citizenship does not seem to have been involved, the case having been one of Federal character by reason of the fact that it was brought by an assignee in bankruptcy under the bankruptcy statute of the United States. It was, therefore, transferred to the circuit court of the United States by the stipulation of parties. Justice Miller, however, seems to have recognized the fact that the Colorado statute, like our own, makes it necessary that the case, to be transferred under the Statutes, must have been one of Federal character at the time that the suit was commenced, as he says in his opening sentence in his opinion in that case, "It was admitted that the case was one which might have been brought in the Federal court if such court had existed at the date of the commencement of the suit."

(c) THE ACT TO BE CONSTRUED.

(1) *Argument.*

It will be observed that the general law of Congress relating to the succession of courts upon the admission of new states has been superseded as to South Dakota by the special act of February 22, 1889, relating to the admission of four states, including the state of South Dakota. All of the provisions of that act upon the subject are quoted above. These provisions are full and ample and undertake to cover the whole subject. All acts or parts of acts in conflict with these provisions are repealed by Section 25. We can, therefore, seek no power or right or limitation from the general act; but must consider the question of jurisdiction and succession in the light of this particular act.

Section 23, so far as its examination is necessary upon this question, provides that in respect to all cases, proceedings and matters pending in the supreme court or district courts of the territory at the time of the admission of South Dakota into the Union, whereof the circuit or district courts of the United States might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory, and as to all other cases the state courts are made the successors of such territorial courts. The inquiry therefore is, was this a case of which a circuit or district court of the United States could have taken cognizance, and in which it could have exercised jurisdiction, if such courts had existed at the time of the commencement of the action. No Federal question being presented, and it not being included in any of that limited class of cases which are by law confided to the United States courts, the only reason for the exercise of such jurisdiction by such courts would be the diversity of citizenship. If a circuit court of the United States had existed, and was exercising jurisdiction within the then Territory of Dakota, to enable it to take cognizance of this case, it would have been requisite that the parties should have been citizens of different states; therefore, we inquire, were these parties then—that is at the time of the commencement of this action—citizens of different states? Clearly not. From the record it appears that the plaintiff, Dorne, now defendant in error, was a citizen of the Territory of Dakota, and that the defendant, now plaintiff in error, was a citizen of the State of New York, at least if not made a domestic corporation by virtue of its acc ptance of the privileges granted to it by the Territory of Dakota. It will be observed that the condition under which the courts of the United States became the successors of the territorial courts in such a case is that such Federal courts would have had jurisdiction if they had existed under the laws of the United States at the time of the commencement of the action. It not being possible, either under the Constitution or any law of Congress, for a Federal court to have had jurisdiction in this case at such time, to wit; at the time of the commencement of the action, the Act of Admission does not give it jurisdiction at any subsequent time.

The test of the Federal character of the suit to entitle it to be transferred to a Federal court under the Enabling Act is specifically placed at the time of the commencement of the action instead of at the time of the admission of the state or at the time that the application to transfer may be made.

Enabling Act. sec. 23.

This requirement that the suit must have been of a Federal character at the time of its commencement is in conformity with the rule that has always prevailed under the removal acts.

Conolly vs. Taylor, 2 Peters, 556.
Beede vs. Cheeney, 5 Fed. Rep.. 388.
Ry. Co. vs. Risley, 50 Ind., 60,
Tappan vs. Martin, 116 Mass., 276.
Holden vs. Ins. Co., 46 N. Y. 1.
Ins. Co., vs. Pechner, 95 U. S., 183.
Mollan vs. Torrance, 9 Wheat., 537.

Cases of Federal character from the fact that they arise under the Constitution, statutes or treaties of the United States would, of course, retain their Federal character from the time of the commencement of such cases until the conclusion thereof, and in such cases it would not be important whether it should be required that they must have been of Federal character at the time that such suits were commenced or whether the provision should be that they must be of Federa character at the time of the admission of the state or at the time of the application for transfer. In cases, however, that derive their Federal character from diverse citizenship of the parties, defendant and plaintiff, it becomes very important to know whether the test of Federal character is placed at the time of the commencement of the suit or at some other time subsequent thereto. As citizenship of parties frequently changes after suit is brought, some cases would necessarily be included and others excluded, according to whether the requirement should be that the cases were of Federal character when the suit was commenced, or whether it should be of Federal character at some subsequent time.

It seems perfectly clear that the first clause of Section 23 provides that cases of Federal character when commenced may be transferred to the Federal courts. No other interpretation of the clause can be had without doing violence to the plain language employed. The statement is, cases in which the Federal court "might have had" jurisdiction "*at the time of commencement of such cases.*" If nothing more had been said upon the subject it might possibly have been contended that not only such cases as such courts might have had jurisdiction of at their commencement could be transferred, but that cases that were not of Federal character at the time of their commencement, but have since become such by reason of change of citizenship of the parties, could be transferred also. Sect. 23, however, has set at rest the possibility of this contention by providing in the second clause thereof that "*all other cases*" shall be transferred to the state courts. This clause sends to the state courts all cases that were not of Federal character at the time of their commencement. No court, indeed, so far as we are aware, that has considered this section, and section 8 of the Colorado Act, which is like it, has failed

to recognize that under this section it is necessary in order to transfer a case to the Federal courts, that it should have been of Federal character at the time the suit was commenced. Justice Miller recognizes that such is the provision of the section in Bates vs. Payson, 4 Dillon 266, as before stated. Justice Corson in rendering his decision transferring this case from the supreme court of the state to the Federal court, interprets the language of the section to the same effect exactly, and has based his entire argument upon the necessity that in order to transfer the case to this court, it must have been of Federal character in October, 1883, when it was commenced. Dorne vs. Richmond Silver Mining Company, 44 Northwestern, 1021. He proceeds, however, to say in substance, that the circuit court of the United States could not have existed in October, 1883, except upon the hypothesis that South Dakota was a state in 1883, and if South Dakota had been a state in 1883, Mr. Dorne, the plaintiff, would have been a citizen of a state in October, 1883. He concludes therefore, that Congress must have intended by section 23, to say that for the purpose of determining the Federal character of cases like the one at bar, it will be considered that the plaintiff, a citizen of a territory, in 1883, was in fact a citizen of a state, and that upon such hypothesis this case was Federal in its character at the time of its commencement. Right here, it seems to us, with great respect, that the supreme court of our state has inadvertently overlooked the fact that it is beyond the power of Congress, under the Constitution, to say that a suit between a cilizen of a territory and a citizen of a state in 1883, should be considered to have been a Federal case at the time it was begun.

No sort of hypothesis can change the *fact* that in October, 1883, the plaintiff was a citizen of a territory and not a citizen of a state; and no sort of legislation can change the fact that this case was not a case of Federal character at the time of its commencement in October, 1883. Such hypothesis on the part of our supreme court appears absolutely necessary in order to reach the conclusion reached by it, that this case could be transferred to the circuit court. This constitutional difficulty does not appear to have occurred to our supreme court, and it did not occur to counsel until after the motion to transfer had been argued and submitted.

We submit, however, that Congress has not made any such unconstitutional provision. It has simply provided that if this case was a Federal case in 1883 it may be transferred to the Federal court, and if not, it must be finally disposed of in the state court. It may be conceded for the purposes of this argument that Congress might have provided that cases now of a Federal character without regard to their character when commenced, could have been transferred to the Federal court. This it has not done, but it has provided distinctly that such cases should be passed to the state courts.

In the act admitting South Dakota it will be observed that by Section 21, the circuit and district courts are empowered to exercise the same jurisdiction and powers, and in like cases, as exercised by all other circuit and district courts of the United States. No extraordinary powers are anywhere given to them; their powers and jurisdiction are those limited, and no presumption exists in favor of

their exercising any further power than such as is conferred upon all of the circuit and district courts of the United States. In Section 23 of the same act, they are made the successors of the territorial courts, in such cases as they would have had jurisdiction of had they existed when the cases were instituted. In other words, the district courts succeed to the territorial courts in such cases as in admiralty, in bankruptcy and other limited cases; the circuit courts succeed the territorial courts where the parties were, at the commencement of the action, residents of different states. No power, we submit, existed in congress to clothe the circuit courts with jurisdiction over cases where such jurisdiction rested merely upon the diversity of citizenship of the parties, if one of the parties to the action was a citizen of a territory. The further citation of cases is not necessary in support of this proposition; it is too well understood. As before stated, Dorne, one of the parties, was a citizen of the Territory of Dakota at the commencement of the action, and the other party a citizen of New York. If the intention was to clothe the circuit court with additional power to that conferred upon the other circuit courts, presumably it would have been clearly stated; the only ground upon which it is claimed that the circuit court in this case was the successor of the supreme court of the territory, is that, by virtue of the Admission Act, Dorne became a resident of the State of South Dakota. In order to sustain this claim there must be interpolated into the statute something which is not found in it; for instance, the courts must add to the statute, in substance, a provision clothing the circuit courts with jurisdiction not only over cases wherin they would have had jurisdiction at the commencement of the action, but also in cases, where, by virtue of the Act of Admission the status of the parties had become changed, and thereby they had become, since the commencement of the action, citizens of different states. We respectfully submit that this court will not do so extraordinary an act as to make this interpolation. We find in the opinion of the state court transferring this case a statement which seems to be the basis for the reason for such transfer, to-wit.: that a district or circuit court of the United States could not have existed covering this portion of the the Territory of Dakota until the admission of the state. We think this assumption is not welt founded. It would have been perfectly competent for Congress to have clothed the Eighth Judicial Circuit with jurisdiction in proper cases over the entire Territory of Dakota. It would not have given that court, of course, jurisdiction where the jurisdiction depended solely on diversity of citizenship, in cases where one of the parties was a citizen of a territory.

The district and supreme courts of the territory were given by Congress the same jurisdiction as pertains to the district and circuit courts of the United States. No one would pretend that that conferred upon the district or supreme courts of the territory, power to sit and act as a circuit court of the United States, simply because one of the parties to the action was a citizen of a state and the other a citizen of a territory.

In the face of the plain provisions of this Act of Admission, which makes the circuit court successor to the territorial courts, only

where such circuit court would have had jurisdiction at the commencement of the action, it is claimed in this case that the intention of Congress was to make such court successor in cases where the citizenship of a resident of a territory had been changed to that of a resident of a state pending the action by virtue of the admission of such state, and upon the ground that such was the intention of Congress, because a circuit court of the United States could not have existed having jurisdiction over this area of country. Now it is well known that several of the states, while still territories, were attached for judicial purposes, to judicial districts formed by acts of Congress, and in which district courts exercised jurisdiction for years before such admission.

Where can be found any limitation upon the power of Congress to include a territory within the limits of any judicial district of the United States? Certainly Congress possessed and exercised the power to create courts for the territories, and conferred upon them the same identical authority and jurisdiction as was exercised in the ordinary district and circuit courts, confining the jurisdiction of those courts to the area included within the territory. No one seriously disputes the validity of such enactment, and if local courts could be thus created with this character of jurisdiction conferred upon them, why could not the district and circuit courts of the United States be clothed with like power and, indeed, all judicial power which could be exercised by any court of record within the limits of the territory and why could not such territory be attached to any judicial circuit or district for that purpose? We can see no reason for any objection to this legislation if Congress had cared to enact it. Therefore the reason for the construction put upon the Act of Admission failing, we submit the whole superstructure must fall, and it could not reasonably be said that the interpolation heretofore spoken of should be made in the statute, because a circuit court could not have existed with jurisdiction over the area of country now embraced within the state of South Dakota.

Again: The history of the case before the court, repeated in part here, shows that these parties had their day in the courts then organized by act of Congress; that the case was tried, a verdict and judgment rendered in the district court of Lawrence County, the court provided by law; that a motion for new trial was there made, was heard and determined, the motion being overruled and denied; that thereupon an appeal from such judgment was taken to the supreme court of the territory. Upon the State of South Dakota succeeding a portion of the Territory of Dakota, and this case falling within the limits of the jurisdiction of South Dakota, the case passed into the state supreme court, from thence by order of that court, to which the defendant in error, Dorne, has taken exception, it was transferred to the circuit court for the district of South Dakota forming a part of the Eighth circuit. Let us examine its position there. In the circuit court it was tried as upon appeal, and the record coming from the territorial district court was reviewed, including the motion for new trial and its outcome. Whence comes this authority for the circuit court to act as an appellate court in such a case? Where is it found? Certainly not in the Act of Admission,

in any express terms, and in no act of Congress anywhere found. Could that court, if it had existed and the state had existed at the commencement of the action, have taken jurisdiction of this case, otherwise than original jurisdiction? If now it can exercise original jurisdiction in the case, a statutory new trial must have been granted by act of Congress, because necessarily the assumption of original jurisdiction in a case would result in a trial *de novo*. A grant of a new trial cannot be implied. We may dismiss this phase of it, perhaps, by the statement that the circuit court did not attempt to exercise original jurisdiction. Its action was solely exercising appellate jurisdiction. But where, we repeat, does it get the authority to sit in judgment as an appellate tribunal to the district courts of the territory?

The Act of Admission in Sec. 21, says that the circuit court shall have and possess the same powers and jurisdiction as pertains to other circuit courts of the United States; no more, no less. It is made the successor of the territorial courts only in cases where it would have had jurisdiction had it existed at the time of the comment of the action. Now, at the expense of some repetition, we respectfully insist that it is in those cases only where the district court of the territory could have acted as a circuit court of the United States, that the circuit court is, by the Act of Admission, its successor. In that event, in that kind of a case, it would succeed, not the supreme court, but the district court where the case was pending and undetermined; and if the parties in such case had chosen to submit to the jurisdiction of the district court of the territory, instead of asking it to exercise the jurisdiction conferred by the Act of Congress upon it, the same as exercised by circuit courts of the United States, would not that have ended the rights of the parties, and could they have appealed to another circuit court of the United States subsequently organized or having its jurisdiction extended therein? This case under any circumstances had passed beyond the point where the circuit court could exercise jurisdiction of it, merely by virtue of diverse citizenship of the parties. It could not take cognizance of the case by appeal. The very nature and organization of the court would preclude the exercise of such appellate jurisdiction, and this attempted forced construction of the Act of Admission necessarily compels it to exercise only this appellate jurisdiction in this case.

In providing for the admission of a state into the Union, Congress finds this condition so far as litigation therein is concerned: Courts established by the authority of Congress, exercising two general classes of jurisdiction; one which pertains to ordinary local affairs, and naturally and necessarily found proceeding in the state courts, if such had existed; the other class of jurisdiction proceeding in the territorial courts thus organized by Congress while exercising the jurisdiction of circuit and district courts of the Uuited States. Congress then makes provision to save the rights of all parties in such litigation, and these provisions are precisely what we find in the act admitting South Dakota, to-wit: That the state courts shall succeed to that portion of the litigation found proceeding in these courts as local courts, and that the United States courts then estab-

lished shall succeed to that portion of the litigation which is found in the territorial courts where they are exercising the jurisdiction of United States circuit and district courts.

Now, apply these provisions to the case at bar. In what court was it proceeding? In the courts exercising this local jurisdiction, or was it in the courts exercising the jurisdiction of the United States circuit and district courts? Of course, it was in the local courts. Then, where do we find in this Act of Admission authority to change the nature of this case? The contention is that these parties are now, since the Act of Admission, citizens of different states. But that act does not make the circuit court the successor of the local courts in litigation where it would not have had jurisdiction at the commencement of this action. This act does not provide that it should become the successor of the local courts in cases where the citizenship of the parties has been changed by the Admission Act of Congress and, therefore, the jurisdiction cannot be based upon such changed condition.

Supposing Dorne was at the time, and ever since had been, a citizen of Arizona, could it be suceesstully contended that the circuit court now could take jurisdiction of the case, or that Congress would have the power to confer upon such circuit court such jurisdiction? Supposing Dorne a citizen of Arizona at the commencement of this action, had removed about the time of the admission of the state to Nebraska, and thereby became a citizen of a different state from that of the corporation, would it be seriously contended that thereby the circuit court became the successor of the territorial court in this case?

What is the condition of such succession? Again we ask. It is that a circuit court of the United States could have entertained jurisdiction at the commencement of the action. Now, Dorne having been at that time a citizen of the Territory of Dakota, it cannot, with reason, we submit, be claimed that any circuit court could have had jurisdiction of the case and the parties upon the ground of diversity of citizenship, which is the only ground for claiming such jurisdiction. Much less ought it to be urged with seriousness that the circuit court succeeds as an appellate tribunal to the litigation of the local courts

There is no failure on the part of congress in providing for the admission of South Dakota to take care of the rights of litigants. It transfers to the state courts cases in which the state courts would have had jurisdiction if they had existened at the commencement of the action. It transfers to the United States courts the cases over which they would have had jurisdiction had they existed at the commencement of the action, including civil and criminal cases.

One further suggestion. Assuming that the state of South Dakota had existed at the time of the commencement of the action, and that Dorne was then a citizen of a territory, under no circumstances could the circuit court have taken jurisdiction of the case, as the law now stands, even if he had removed from the territory, of which he was then a citizen, to the State of South Dakota, or any other state. The citizenship at the commencement of the action determins the jurisdiction of the court, where it depends upon diverse

citizenship, and Congress, in this Act of Admission has followed this rule; has not attempted to change it, or confer upon persons either sueing or having been sued in the Territory of Dakota rights or extraordinary privileges which do not pertain to other citizens; and Congress has not attempted to confer upon the circuit court in that district these extraordinary appelate powers contended for it.

(2) *The Decisions.*

In all the new states, other than South Dakota, where this question has been submitted, the district and circuit courts have taken the position upon this question for which we contend. This statute has been so construed in each of the following cases:

Strasburger vs. Beecher, 44 Fed. Rep. 209, C. C. Mont. June 30, 1890, Knowles, J.

Dunton vs. Muth, 45 Fed. Rep. 390, C. C. Mont. Feby. 5, 1891, Knowles, J.

Nickerson vs. Crook, 45 Fed. Rep. 658, C. C. Wash. Mch. 4, 1891, Hanford, J.

Carson vs. Donaldson, 45 Fed. Rep. 821, C. C. Wash. Mch. 4, 1891, Hanford, J.

Johnson vs. Bunker Hill and S. M. & C. Co., 46 Fed. Rep. 417, C. C. Idaho, April 29, 1891, Sawyer, J.

The only contrary decisions, as far as we are aware, are the case at bar; opinion by Edgerton District J. November 11, 1890, Record p. 146; reported in 43 Fed. Rep. 690, Herman vs. McKinney, 43 Fed. 689, Shiras D. J. Nov. 8, 1890, in South Dakota Circuit and Miller vs. Sunde, 44 N. W. Rep. 301, (North Dakota) Feby. 5, 1890. In none of these cases, except the case at bar, was the action pending in the *appellate court* of the territory at the time of the admission. In Miller vs. Sunde, *supra*, the supreme court of North Dakota enters into no discussion of the statute, but simply states that the request for transfer shows the plaintiff "both at the time of the commencement of the action and at the time of filing the request, was a citizen of the state of Minnesota, and that the defendant was, when the action was commenced, a citizen of the Territory of Dakota, and was at the time the request was made a citizen of the State of North Dakota. These facts made the Federal circuit court the successor of the territorial district court; and the request when presented in open court *eo instanti* divested the state court of all jurisdiction." In Herman vs. McKinney, *supra*, Judge Shiras passes over the question in a few words, and we submit has inadvertently fallen into the error that we have already endeavored to point out. He says: "By the twenty-third section of that act (the Act of Admission) it is, in substance, declared that cases which would have been of Federal jurisdiction when brought, if South Dakota had been a state with a Federal court organized therein are, at the request of either party, transferable to the Federal court. * * * * When the suit was brought it involved over $2,000. The parties were residents and citizens of different states, viewing, as the act requires us to do, the Territory of Dakota as being then a state; in other words if, when the suit was

brought, there had been in existence a Federal court for South Dakota, it would have had jurisdiction of this cause. This being so, then under the Omnibus Act either party could cause it to be transferred into the Federal court" It requires no argument to show that the assumption that the "*parties were residents and citizens of different states*" when the "*suit was brought*" is erroneous, the *fact* being that one party was at that time a citizen of a territory and the other of a state; and the conclusion of jurisdiction based upon that assumption is equally bad.

In the case at bar Judge Edgerton in reaching the conclusion that he did, has necessarily employed the same logic. When Judge Edgerton's opinion was filed, on November 11th, 1890, the contrary opinion of Judge Knowles in Strasburger vs. Beecher, *supra*, had already been rendered (June 30th, 1890), but no reference is made to it by Judge Edgerton, and he doubtless had not seen it, as for some reason it was not published until the 44th Federal, although Judge Edgerton's opinion appears in the 43d Fed.

All of the four remaining cases, already cited, were decided after Judge Edgerton's opinion in this case. That opinion was before the judges who rendered these later decisions, considered by them, and in each instance the conclusion of the learned judge in this case is dissented from, and the contrary construction is adopted.

The latest decision interpreting the provisions of this statute is that of Sawyer, Circuit Judge, in Johnson vs. Bunker Hill & S. M. & C. Co., *supra*. We conclude our argument upon this branch of the case with a liberal quotation from Judge Sawyer's opinion in that case. We do this, not in any sense regarding the decisions of inferior Federal courts as authority in this court; but because of the eminent ability and reputation of Judge Sawyer as a Federal jurist, and further, because his opinion presents a better analysis of the statute, and an abler criticism of the construction of which we complain than we could hope otherwise to present. We quote from 46 Fed. Rep., beginning at page 418:

"Now it is supposed in the cases in South Dakota, that this clause where the circuit or district court of the present district of South Dakota might have had jurisdiction by the laws of the United States had such court existed at the time of the commencement of such suits, authorizes those suits which were commenced in the territorial court before admission by citizens of the territory against citizens of a state to be transferred to the present circuit and district courts of that district; that they passed to the circuit court of the United States, for that district. That section, perhaps, is as before intimated, a little ambiguous, taken by itself, but we do not think that that was the intention of Congress, after taking into consideration the preceeding and succeeding sections of this act. In Section 16 it is provided that 'the circuit and district courts of said district, and the judges thereof, respectively, shall possess the *same powers and jurisdiction* and perform the same duties *required to be performed by the other circuit and district courts and judges of the United States, and to be governed by the same laws and regulations.*' That indicates a purpose to give the circuit and district courts of Idaho the same jurisdiction that is possessed by the circuit and district

courts of other districts and no more. It does not appear to contemplate an *exceptional* jurisdiction. And to give the construction that is contended for would be to defeat that provision and give the circuit court for the district of Idaho jurisdiction which the United States circuit courts of other districts did not before and do not now have. Again the court shall be '*governed by the same laws and regulations*' as those which govern the United States circuit and district courts and judges of other circuits and districts; and to give the construction contended for would be to hold that the circuit court of Idaho woutd not be governed by the same laws and regulations as the circuit courts of other circuits and districts, whose jurisdiction is not affected by a change of citizenship, *pendente lite*. So, again, section 19 provides that 'from and after the admission of said state into the Union, in pursuance of this act, the laws of the United States, not locally inapplicable, *shall have the same force and effect within said state as elsewhere within the United States*,' thus again expressing an intention to put, and keep, the people of Idaho upon precisely the same footing as the people elsewhere in the United States and territories; and not to make them an exception in this matter of jurisdiction as the construction contended for, and adopted in South Dakota, would do. Had one of the parties to this suit been a citizen of Utah, Arizona or New Mexico, instead of Idaho at the time of the commencement of the suit, I think it would not be seriously contended that upon the admission of Idaho, and organization of the circuit court, the case would have gone to the United States circuit court. Yet there is no more reason in public policy for granting this right to a citizen of Idaho than to a citizen of any other territory. Again, we are not to suppose that Congress intended to extend the jurisdiction beyond the provisions of the Constitution, even if had the constitutional power to do so, unless the act is so explicit that it will bear no other construction.

Now the constitution provides for the jurisdiction of the courts of the United States in cases between citizens of different states, not between citizens of a territory and a state. To give this construction would also be to confer favors upon the citizens of the territory of Idaho and the Dakotas and Washington, that were not conferred upon the citizens of any other state or territory; it would be to change their *status* in this particular after the commencement of the suit. We do not think Congress intended any such result or contemplated any such change. It did not intend to go beyond the constitutional provision. We think it simply intended to enforce the laws of the United States with reference to the litigation of parties and the jurisdiction of courts as they then stood, and as they were applicable to all other states and territories and as applicable at the time of the commencement of the suit, only as is done in the several Removal Acts, where a change of citizenship, after suit commenced does not effect the right of removal either way. We desire to call attention to this provision also; 'the records * * * * shall be transferred to such circuit, district and *state* courts, *respectively*, and the same *shall be proceeded with therein in the due course of law*.' That is to say the General Laws of the United States, applicable to the proceedings of these courts in other districts shall apply to them in

the district of Idaho, whether the case goes to a United States or state court. And again, the provision under which the question arises is, 'that in respect to all cases, proceedings and matters now pending in the supreme or district courts of said territory at the time of the admission into the Union of the State of Idaho and arising within the limits of such state whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States *had such courts* (*not such state*) *existed at the time of the commencement of such cases*, the said circuit and district courts respectively, shall be the successors of said supreme and district courts of said territory.' At the time this suit was commenced this court, had it existed, would have had no jurisdiction of it on the ground of citizenship because it would have had no jurisdiction of a case between citizens of a territory and citizens of a state; that is settled by the laws of the country and numerous decisions of the Supreme Court. If Congress gives it that jurisdiction then it must do so by some act—some provision changing the rights of the parties, passed after the commencement of this suit. And the intention of Congress to make such changes, *out of harmony with its general system*, should be expressed in unequivocal terms.

Says the learned judge, in *Dorne vs. Silver Min. Co.*, before cited, 43 Fed. Rep., 694: 'Now no circuit court of the United States *can exist except* in a state admitted into the Union.' Then to state the proposition differently, the Enabling Act gives jurisdiction at the commencement of the action, provided South Dakota had at *that time been a state in the Union*, and a circuit court of the United States organized therein. But South Dakota was not at that time a state and there was no circuit court of the United States organized therein, and the statute does not say that the present circuit court shall have jurisdiction over all cases over which it might have taken jurisdiction had South Dakota then been a state, and one of the parties to the suit had then been a citizen of the then State of South Dakota. We submit that this is an entirely different proposition, instead of the same proposition differently stated. The interpretation contended for requires this imaginary interpolation into the statutes, which we are not authorized to make. The supposed existence of a circuit court of the United States for the district of Idaho by no means authorizes, also, a supposed imaginary *State* of Idaho. We cannot concur in the statement that 'no circuit court of the United States *can exist*, except in a state admitted into the Union.' We know of nothing in the Constitution to prevent Congress from creating just such a court as we now have, if, in its wisdom, it had seen fit to do so, for administering the purely national laws as in the case of states, leaving the territorial laws, enacted by its legislation to be administered in the territorial courts, instead of mingling their administration in the territorial courts, as is now done. The territorial courts now, as we understand the matter, act in two capacities. Why might not Congress, if it deemed best, separate the two classes of business? Suppose Idaho had not been created a state, but Congress had adopted a law on a model of section 16 of the Act of Admission reading as follows:

'That the said Territory of Idaho shall constitute a judicial dis-

trict, the name thereof to be the same as the name of the territory, and the circuit and district courts thereof shall be held at the capital of the territory for the time being, and the said circuit and district courts shall have and exercise the same jurisdiction and powers and in like cases as is exercised by all other circuit and district courts of the United States, and the said district shall, for judicial purposes until otherwise provided, be attached to the ninth circuit. There shall be appointed for said district one district judge, one United States marshall. one clerk of the district and one of the circuit court, and one United States attorney.'

What constitutional objection could be successfully urged against such a law? And if such a law had passed in what respect would these courts so created have been different from the 'circuit and district courts of the district (not state) of Idaho,' now created? They would have been United States circuit and district courts for the district of Idaho, as they now are, with precisely the jurisdiction, functions and powers they now have. The state, as such, has no concern with the present courts. The State is only referred to in the section creating this district to define the boundaries, and its name furnishes a name for the district, or is adopted as the name of the district. Why would not the supposed courts be substantially, in all things, the same courts as the present ones? If we are right in this supposition, then, it does not follow that if such a court had been created there must also necessarily have been a state created. We are satisfied, therefore, that the decisions of Judges Knowles and Hanford give the correct interpretation of this statute and that this case is not embraced within the purview of the provision in question, and is not entitled to go into the circuit court, on the ground of diversity of citizenship and that it was improperly sent to this court and should have been sent to the state court. The order to remand to the state court will therefore be made. Dorne vs. Silver Min. Co., as shown by the report of the case in 43 Fed. Rep. 691, was transferred from the *supreme court of the state*, after admission, where it was then pending, the case having been pending in the territorial supreme court at the time of the admission of South Dakota as a state. It was an action for damages wherein a verdict and judgment were had in the court of original jurisdiction for over $15,000. That case, it appears to us as now advised, should have remained in the state supreme court and not have been sent to the circuit court of the United States. We find no authority in the law admitting the state, or any other law for transfering such a case to the circuit court, or any authority in the statutes whatever anywhere for exercising by the circuit courts, either before or after the admission, *appellate* jurisdiction *in such a case*. If we are right in this view, then the questions decided, arising from the diversity of citizenship, were out of the case altogether as the circuit court could not take jurisdiction under any circumstances.

This ground of want of jurisdiction, or authority of the circuit court to succeed to the supreme court of the territory in that case does not appear to have been called to, or to have attracted the attention of the court. If it did attract the attention of the court, then in construing the Admission Act the court must have overlooked the

fact that the circuit court has but a very limited appellate jurisdiction from the district court, as in admiralty cases in which the exclusive jurisdiction, original and appellate cases, is in the national courts. In such cases the United States district courts under the national system in use have original jurisdiction, and the circuit courts appellate jurisdiction from the district courts. In the territories the original jurisdiction is in the ordinary courts of the territory of original jurisdiction, and the appellate jurisdiction in the supreme courts of the territories. Now, on the admission of a state in such cases, and such other limited classes of cases over which the circuit courts have *exclusive* jurisdiction on appeal from the *exclusive* original jurisdiction of the district courts, appeals may be pending in the supreme court of the territory and these must necessarily go the circuit courts if anywhere, as the states have no jurisdiction over them, and nothing to do with them. On the other hand, there may also be pending in the supreme court of the territory, on its admission as a state, appeals from the lower courts in cases which are properly of state cognizance, and over which the circuit courts of the United States have no appellate jurisdiction whatever, and with which they have no right to concern themselves. These, of necessity, should go from the territorial supreme court to the state supreme court which takes its place, and where only they belong. Thus on the admission of a territory as a state there may be pending in its supreme court, on appeal, both classes of cases, one of which belongs exclusively to the circuit court of the United States, and the other exclusively to the supreme court of the state. And the act of the admission of Idaho, evidently provides for both classes, and sends them to the proper courts—those which belong to the circuit court, it having the exclusive appellate jurisdiction, to the circuit court; and those which belong to the state jurisdiction, to the supreme court or appellate court of the state. The language of the act seems clear on this point and susceptible of but one construction that can give all its words full force and meaning. It is:

'And the *circuit* and district and *state* courts herein named, shall *respectively, be successors of the supreme court of the territory, within the limits embraced within the jurisdiction of such courts, respectively*, with full power to proceed,' etc., Section 17.

Now this confers no new jurisdiction on either the circuit court or supreme court of the state, but simply transfers to each the cases in which they *respectively, already have jurisdiction, under the laws of Congress*, and under the laws of the state *respectively*, under which they are organized. And Section 18 carries out the idea in this language:

'In respect to all cases, proceedings and matters now pending in the *supreme* or *district* courts of said territory, at the time of the admission into the Union of the said State of Idaho, whereof the circuit or district courts by this act established, *might have had jurisdiction under the laws of the United States had such courts existed at the time of the* commencement of such cases, the said circuit and district courts respectively shall be the successors of said supreme and district courts of said territory.'

Now the circuit court *at this time* has no appellate jurisdiction

from any court whatever of such a suit as that transferred from the supreme court of South Dakota to the circuit court of said district; consequently, it could not have had jurisdiction of the same, or a similar case 'under the laws of the United States,' had this court existed at the time of the commencement of that case. It is, therefore, not within any provision of the act, but it clearly falls within the next provision of Section 18:

'And in respect to all other cases, proceedings and matters pending in the *supreme* and district courts of said territory at the time of the admission of such territory into the Union, arising within the limits of said state, the *courts* (plural, including supreme as well as district courts), *established by such state* shall, *respectively*, be the successors of said *supreme* and district territorial courts, (and the records, etc.,) shall be transferred to such circuit, district and state courts, respectively, and the same shall be proceeded with in due course of law.'

That is to say, all cases pending on appeal in the supreme court of the territory at the date of admission, over which the circuit court has appellate jurisdiction by the other laws of the United States, as in admiralty and bankruptcy cases, and such other very limited classes as have been confined to its appellate jurisdiction, should be transferred to the United States circuit court; and all others to the supreme court of the state. As was said in discussing the first point, any other construction would take the circuit courts of Dakota and Idaho out of harmony with the system of circuit courts established under the constitution and laws of the United States, and give them on exception *appellate* jurisdiction—an appellate jurisdiction no vested in any of the older circuit courts; whereas Congress in the various sections quoted plainly indicates a purpose to put them upon the same footing with other circuit courts, and that they shall have the same power and be governed by the same laws, and no other. The case in question, in our judgment, as at present advised, should have gone to and remained in the state supreme court, and not have been sent to the United States circuit court."

II.

*The circuit court erred in its conclusion that the district court of Lawrence County, Dakota Territory, had committed error upon the question of damages, and in refusing to affirm the judgment of that court unless one-half the amount should be remitted.*

In assessing the damages the jury evidently found the value of the stock in controversy to be one dollar per share, and added legal interest to that valuation. This valuation is fully sustained by the evidence, and we believe counsel for defendant will seek in vain for any error, either in the admission of the evidence upon this subject or in giving or refusing instructions. The witness, Dorne, testified that he was acquainted with the market value of the stock in Deadwood at the time that it should have been delivered to him, and that the market value was over a dollar per share (Record, p. 21 Q. 128 and p. 22. Q. 142, 143)—that it could not have been procured in Deadwood or vicinity for less than one dollar per share, and, al-

though efforts were made to buy it in Deadwood, none could be found for less than two dollars per share (Record, p. 22., Q. 147, 148, 149). This direct testimony was introduced without objection or exception, either upon the ground of qualification of the witness or competency or materiality of the testimony. Defendant counsel, Mr. VanCise, assisted in eliciting the testimony from the witness (Record, p. 22, Q. 143.) There were a few general objections made to preliminary questions, without stating any grounds or apprising court or counsel of the nature of the objections. These general objections, we submit, were wholly unavailing. They were, however, *sustained*, except in two instances, when they passed without any ruling by common consent. Defendant's counsel cross-examined fully upon this testimony (Record, pp. 35, 36). Upon examination the witness testified in substance that sufficient stock to replace the number of shares due him could not be obtained nearer than the New York market, and that in New York it was worth $1.50 per share; that he had an opportunity to sell a portion of it for $1.50 per share; that he made efforts to buy for one dollar per share, but could not obtain it. This testimony was introduced without objection (Record pp. 41, 42, 43, Q. 2 to 27, inclusive). Defendant's counsel then cross-examined at considerable length (Record, p. 43 to 49, inclusive), eliciting, among other things, the fact that the witness made sale of 5,000 shares in New York for $1.50 per share, but could not get stock with which to complete the sale (Record, p 46, Q. 49 to 55), and that sometime afterwards he disposed of some smaller lots for 75 cents per share in Deadwood (Record, p. 48, Q. 87 to 100, and p. 49, Q. 110 and 111). Plaintiff then rested (Record, p. 49).

He was permitted to rest his case without any motion or objection against the competency of the evidence introduced or its sufficiency. Defendant then proceeded with its defense and, upon the subject of damages, introduced the testimony of Mr. Scrymser, president of the defendant corporation, who testified to a market value in New York of fifty cents per share. (Record p. 53.) After the conclusion of Mr. Scrymser's testimony, witness John R. Wilson was sworn and examined for the defendant. An adjournment of the trial was then taken until the following day. Upon the resumption of the trial the following morning, defendant's counsel made the first and only motion directed against plaintiff's evidence of damages. It is found at the bottom of page 67 of the record. It will be noticed that this motion is not directed against the entire testimony upon this subject, but only against certain specific transactions—that is the negotiations for sale of 5,000 shares to a party in New York, and alleged efforts to buy stock in the Deadwood market at one dollar per share with which to complete that sale. Had this motion been sustained the general testimony as to the market value in Deadwood of over one dollar, of the market value in New York of $1.50, the particular sales later at 75 cents per share, and Mr. Scrymser's testimony of 50 cents market value in New York would still have remained, and would have been amply sufficient to have sustained the verdict of the jury for $1 per share. The motion, however, was properly denied. Made as it was in the midst of defandant's case, and against testimony that had been admitted without objec-

tion, it was entirely discretionary with the court whether to allow or deny the motion – even if the objection embodied in the motion would have been valid if made at the proper time. By failing to object to the evidence, the defendant conceded that it might be regarded as proper evidence in the case. Had timely objection been made, plaintiff's counsel might well have introduced other testimony upon the subject before resting the case.

The instructions given by the court fully and clearly announce to the jury the proper measure of damages. The only instruction offered by defendant upon the subject is No. 7, pages 78 and 79 of the record. It correctly states the measure of damages, but is objectionable in the last clause, which reads, "and you are further instructed that there is no competent evidence as to plaintiff's damages before you in this action unless it be the evidence of Mr. Mordock." This clause would have taken from the jury all of the evidence on behalf of plaintiff upon the subject, as well as the evidence of defendant's witness, Mr. Scrymser. Mr. Mordock's testimony was not legally entitled to special consideration over that of the other witnesses, and, of course, the instruction was necessarily refused. Identically the same rule as to the measure of damages asked in defendant's instruction No. 7 was given by the court in three instructions requested by the plaintiff, No. 1, (Record pp. 80 and 81) No. 6, (Record p. 82) and No. 7, (Record p. 82). There was no controversy between the litigants as to the measure of damages—both understood the rule alike, and the Court's instructions upon the subject could not possibly have been misunderstood by the jury. It was purely a disputed question of fact as to the market value of the stock in Deadwood and New York within a reasonable time after the stock should have been delivered. The jury resolved that question in favor of the plaintiff's testimony, but awarded him the lowest value to which he testified.

The following authorities and statutes fully illustrate the positions for which we contend:

**OBJECTIONS AND EXCEPTIONS.**

A general objection without disclosing the nature or grounds thereof and pointing out the specific question, if any be raised, is nugatory and wholly ineffectual in a court of error.

St. Croix Cumber Co. vs. Pennington, 2 Dak., 467, 474.
Caledonia Gold Mining Co. vs. Noonan, 3 Dak , 189, 198.
Hayne on New Trial and Appeal, Sec. 105.

The appellate court will not consider the question of admissibility of testimony to which no exception has been taken:

Territory vs. Keyes, 5 Dak., 244-249.

If the court's attention is not called to the fact that he has omitted to rule on a question before him, the objection is waived: Silcox vs Lang, 20 Pac. 297 (Cal.)

Objections to admission of evidence must be made at the time the evidence is offered; if admitted without objection, it is not error for the court to refuse to strike it out upon motion later in the case.

Hayne on New Trial and Appeal, Sec. 103, pp. 288, 289, 290 and 291.

B. R. & A. W. & N. Co. vs. Boles, 24 Cal, 359, 363.
King vs. Haney, 46 Cal. 561.
Pontius vs. People, 82 N. Y. 339, 346.

A motion to strike out all the testimony of a witness is properly overruled where it appears some of the testimony was elicited by the questions of the party making the motion:

McCarty vs. Waterman, 96 Ind. 594.

A motion to strike out evidence is addressed to the discretion of the trial court and a court of review will not interfere with a fair exercise of such discretion.

Balie's Trial Practice, p. 206.

By failing to object to evidence as to damages introduced, defendant conceded that it might be regarded as proper evidence in the case.

Rosum vs. Hodges, 47 N. W. Rep. 141. (S. D)
Warder vs. Ingli, 46 N. W. Rep. 181. (S. D.)

Where evidence relevant to the issue is received and admitted without objection, and no motion made to strike out such evidence. it cannot be objected to on appeal nor its probative force questioned, Failure to object or to move to strike out, is a waiver of objection.

Warder vs. Ingli, 46 N. W., 181. (South Dakota.)
Yetzer vs. Young, 52 N. W., 1054 (South Dakota.)
Lindsay vs. Pettigrew, 60 N. W., 744. (South Dakota.)

## MOTION FOR NON-SUIT WAS NECESSARY.

Defendant failing to object to the introduction of the evidence it was necessary for it to make a motion for non-suit at the close of plaintiff's case; such motion for non-suit would have to specify the particular defects in plaintiff's proofs.

Hayne on New Trial and Appeal, sections 116, 117, 118 and 119.

Where the defendant does not move for a non-suit he admits that the evidence on the part of the plaintiff is sufficient prima facie to justify a verdict in his favor.

Ross vs. Colby, 3 Hun, 546.
Peake vs. Bell, 7 Hun, 454.
Barrett vs. R. R. Co., 45 N. Y., 628-632.

## MEASURE OF DAMAGES.

"The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has been fully paid to him in advance, is deemed to be the same as in the case of wrongful conversion."

Dakota Civil Code, sec. 1956.

"The detriment caused by the wrongful conversion of personal property is presumed to be: (1) the value of the property at the time of the conversion, with interest from that time; or (2) where the action has been prosecuted with reasonable dilligence, the highest mar ket value of the property at any time between the conversion and the verdict without interest at the option of the injured party, and (3)

a fair compensation for the time and money properly expended in pursuit of the property."

Dakota Civil Code, section 1970.

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is an amount which will comyensate the party aggrieved for all the detriment approximately caused thereby, or which in the ordinary course of things would be likely to result therefrom."

Dakota Civil Code, sections 1947 and 1948.

"In estimating damages, the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded, as would suffice with reasonable diligence for him to make such purchase."

Dakota Civil Code, section 1980.

The price at which a purchase could have been made within a reasonable time is alone the proper measure of value.

Dana vs. Fiedler, 12 N. Y., 40.

The verdict will not be set aside for excessive damages unless it is so excessive or outrageous with reference to all the circumstances of the case as to demonstrate that the jury acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.

Sutherland on Measure of Damages, 6th edition, pages 762, 763, 764, (601, 602.)

Larson vs. Grand Forks, 3 Dak., 307.

## MARKET VALUE.

The market price of a marketable commodity may be determined as well by offers to sell as by actual sales.

Harrison vs. Glover, 72 N. Y., 451.

Cliquot's Champagne, 3 Wallace, 143.

Abbott's Trial Evidence, pages 309, 310.

A single sale is relevant and admissible evidence to show the market value.

Abbott's Trial Evidence, p. 309.

Smelzer vs. White, 92 U. S., 395.

R. R. Co. vs. Gest, 34 Fed. 645.

N. W. Fuel Co vs. Mahler, 30 N. W. Rep. 756, (Minn.)

Cook on Stock and Stockholders, § 581 and note 3.

Where there is no market value, the real value is to be ascertained from such evidence of value as is attainable, for example, by highest obtainable selling price.

Plumb vs. Campbell, 18 N. E. Rep. 793, (Ill.)

The question of damages by a market value is for the jury who may determine it from the price before and after the time of delivery.

Countz vs. Kirkpatrick, 72 Pa. St., 356.

## INSTRUCTIONS.

It is not error for a court to omit to charge on a particular point unless requested to do so.

Pielke vs. Chicago, M. & St. P. R. R. Co., 5 Dak. 444, 461.
Hayne New Trial and Appeal, Section 120.
Williams vs. Hartford Ins. Co. 54 Cal. 449.
Chamberlain vs. Vance, 51 Cal. 84.

An appellate court in determining the question of error in giving or refusing instructions will examine and pass upon the instructions as a whole and not in fragmentary parts, and from such examination determine whether the jury may have been misled, or the appellant prejudiced.

Territory vs. Chartrand, 1 Dak. 379.
United States vs. Adams, 2 Dak. 305.

We believe no error can be found in the record of the trial court. Whatever liberality may have been exercised in the admission of plaintiff's evidence of damages was owing to the fact that defendant's counsel were willing to admit the evidence without objection. They first became dissatisfied with the evidence after the jury had returned a verdict against them. The defendant's position in this case is well set forth by the supreme court of our own state in the case of Warder vs. Ingli, 46 N. W. Reporter, 181, at p. 182: "If defendant had regarded this testimony from this witness as incompetent, he should have objected to it. If its incompetency was not apparent until his cross examination, he should then have asked to have it stricken out. These were substantial, relevant facts in support of plaintiff's claim * * * * and while, really, this witness might not have been competent to so testify, the failure of defendant to object or move to strike out was a waiver of such objection. It led the plaintiff to understand that the rule requiring the best evidence would not be insisted upon, and that such method of proof, though objectionable, was satisfactory. Allowing it to go in, and remain in unchallenged, estops him from now raising the question of its competency, or its force as evidence of the facts stated. This rule is well settled."

We respectfully submit that if this court should conclude that the circuit court properly assumed jurisdiction of this cause, there being no error in the trial court, the order of the circuit court requiring plaintiff to remit one-half of the judgment should be overruled and the judgment of the district court of the Territory of Dakota should in all things be affirmed.

S. S. BURDETT,
G. C. MOODY,
EBEN W. MARTIN,
Counsel for Administrator of Victor Dorne, Deceased.

# In the Supreme Court of the United States.

OCTOBER TERM, 1894.

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|---|---|
| THE RICHMOND SILVER MINING COMPANY, Plaintiff in Error, vs. SEBASTIAN KOENIGSBERGER, Administrator of the Estate of Victor Dorne, deceased, Defendant. | No. 220. |

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

## BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

### Introductory Statement.

This case was begun in the District Court of Dakota Territory in and for Lawrence County, in October, 1883, by Victor Dorne, in his lifetime, against the Richmond Silver Mining Company for damages for the breach of an agreement alleged to have been made by it with him for the delivery of certain shares of its stock, the existence of which agreement the company

denied; a trial was had in 1889; numerous exceptions saved to the rulings of the Court, by the company, a motion made to direct a verdit for it, which was overruled, and, thereupon, under instructions given, a general verdict was returned for Dorne. Subsequently, a motion for new trial was made in the Territorial Court, on seven general grounds with numerous specifications, accompanied also by affidavits of newly-discovered evidence, which motion was overruled. Thereupon judgment was entered for Dorne, and from this judgment, and the order overruling the motion for a new trial, an appeal was taken to the Territorial Supreme Court, where it was pending at the time of the admission of the southern half of Dakota Territory into the Union as the State of South Dakota. At the first term of the Supreme Court of that State, in February, 1890, a motion was made by counsel for the Richmond Silver Mining Company to transfer the case to the Circuit Court of the United States for the District of South Dakota, as the successor of the Territorial Court, and upon the ground that the case was one whereof said Circuit Court might have had jurisdiction under the laws of the United States had such Court existed at the time of the commencement of the case (see Section 23 of the Act of Congress entitled "An Act to provide for the division of Dakota into two States," etc., approved February 22d, 1889, 25 U. S. Statutes at Large, 676). This motion was granted (Record, p. 135). A motion was then made by Dorne's attorneys in the Circuit Court to remand, and this was denied (Record, p. 145). The case was then argued on its merits at Sioux Falls, in the Eastern Division of the State, in October, 1890, before Judges EDGERTON and SHIRAS, and a decision rendered by them that, while

reversible error had been committed in the trial Court upon the question of damages, yet its judgment could be affirmed for one-half the amount thereof, provided the plaintiff Dorne would consent to remit the balance (Record, p. 154). This he afterwards did in writing (Record, pp. 152-3). And thereupon a judgment was entered for the remaining half, and from this judgment a writ of error was issued upon the petition of the Richmond Silver Mining Company and the case brought to this Court for review.

Several errors were assigned to the decision of the Circuit Court of the United States (Record, pp. 156-7), which can be briefly stated as follows:

(1) The Court erred in that, while it found that reversible error had been committed by the trial Court upon the question of damages, yet it made its order of reversal conditioned on respondent's failure to remit one-half of the judgment, and provided that upon his remitting such half, a judgment of affirmance might be entered for the remainder. (2) The Court erred in directing an affirmance of the judgment for one-half the amount thereof, for the reason that for the many errors assigned in the Territorial Court and made a part of this record, the judgment of the trial Court ought to have been wholly reversed and set aside, and a new trial of the case granted in the United States Circuit Court. (3) The Court erred in declining to consider the affidavits used in support of the motion for new trial in the Territorial Court.

## ARGUMENT.

In the above statement of errors committed in the United States Circuit Court, No. 1 includes assignments II. and IV. (Record, p. 157); while No. 2 represents assignment III., and includes the errors assigned in the Territorial Court (Record, p. 122); and No. 3 represents assignment I. In this order they will be considered here:

### I.

**The Court erred, in that while it found that reversible error had been committed by the trial Court upon the question of damages, yet it made its order of reversal conditioned on respondent's failure to remit one-half of the judgment, and provided that, upon his remitting such half, a judgment of affirmance might be entered for the remainder.**

It was contended in the Court below, by counsel for Dorne, that, while this was a case at law in which a general verdict had been rendered, yet the Court might, under the local statute, enter a modified judgment. That statute reads as follows:

"Upon an appeal from a judgment or order, or upon a writ of error, the Supreme Court may reverse, affirm or modify the judgment or order, and as to any or all of the parties, and may if necessary or proper order a new trial, and, if the appeal is from a part of the judgment or order, may reverse, affirm or modify as

to the part appealed from" (Comp. Laws, South Dakota, Sec. 5238).

The Court did not regard itself as having power, under this section, in a law action, tried to a jury, and general verdict rendered, to enter a modified judgment except on the written consent of the judgment creditor. Accordingly, an order was made reversing the decision and judgment of the trial Court and awarding a new trial, unless within ten days the judgment creditor should file his consent in writing to remit one-half the amount recovered, in which event a judgment of affirmance might be entered for the remaining one-half, with interest at seven per cent. from the date of the judgment in the trial Court (Record, pp. 151-2, also p. 154). Thereupon, the judgment creditor filed the required consent, remitting one-half of the judgment as rendered (Record, pp. 152-3), and judgment was entered for the balance and interest, $8,823.96, but without costs (Record, pp. 155-6).

This, we contend the Court had no power to do; but that its finding of reversible error on the part of the trial Court on the question of damages, as is recited in its exceptions (Record, p. 154), absolutely obliged it to reverse the judgment *in toto* and grant a new trial.

The Court's recital in this matter is, unfortunately, not so definite as it might have been,

"this Court being of the opinion that reversible error had been committed in the trial Court upon the question of damages, but that the judgment of the trial Court could be affirmed for one-half the amount thereof, provided plaintiff would consent to remit the balance," etc. (Record, p. 154);

but the plaintiff in error is entitled to the benefit of any presumption that may arise from that indefiniteness.

And it needs but a cursory examination of the evidence on the question of damages, and objections and exceptions taken to admission and exclusion of evidence on the question, the shifting of the Court upon the subject, its admission of improper questions and putting of improper interrogations of its own, and the character of its rulings and instructions, to find this reversible error (see Record, pp. 21–2, objections sustained to Qs. 129, 140); then after these rulings rejecting evidence of market value in Deadwood, where there was not a share of stock held, witness was next allowed to testify to a market value there, and the Court itself asked the market value (p. 22). Also, Record, page 41, objection sustained to question 6, asking what Kyte and Penniwell offered their stock for, held at Galena, preferred stock, too, and the only stock in the State, and a positive statement by the Court: "He can state if he knows, where there has been considerable transactions in it, what it brought in the market, but he cannot state individual instances," and immediately afterward the Court itself asking (p. 42): "What was it worth in Deadwood?"—where not a share was held or in the market. Then the admission of the "individual instance" of the witness' individual attempt at a sale, which bears the marks of falsehood so plainly as to illustrate the reason of the rule excluding "individual instances" (pp. 42–3 and 43–8), and the Court's subsequent refusal to strike this testimony out, although clearly incompetent (p. 67), and its refusal to direct a verdict for defendant (p. 77). Then its neglect to caution the jury regarding such testimony, its refusal to instruct as requested by the Richmond Company that there was no competent evidence on the question of damages except that of Mordock (pp. 78–9), although

giving an instruction based on South Dakota Comp. Laws, Sec. 4613:

"In estimating damages * * * the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where such property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence for him to make such a purchase" (Record, pp. 80–1.

Yet there was not a particle of evidence as to any value for the stock at a time or place to fit the rule there stated. Scrymser's admission (Record, p. 53), that he had paid fifty cents a share for his stock, and that the stock had sold at fifty cents a share, gives neither time nor place of sale (unquestionably a private one), and if the place was New York, yet there was stock in Chicago (Dorne's Testimony, Q. 138, p. 21; Q. 1, re-examination, p. 39), and the time should have been three weeks (Q. 155, p. 35) from date of the deed, December 11th, 1882 (pp. 14, 15). The contradictions in Dorne's testimony wholly destroyed it. He didn't think there was 10,000 shares of the stock in Deadwood in February, 1883 (Record, p. 22, Ans. to Q. 145); as a matter of fact, up to September, 1883, he didn't know of a share (p. 166, Ans. to Q. 166). Yet he testified at one time that the market value in Deadwood was a dollar in February, 1883 (p. 22, Ans. to Qs. 142–3), and at another that it was worth two dollars (p. 42, Ans. to Q. 9). And so on *ad nauseum*.

No wonder the Court was of opinion that reversible error was committed in the trial Court upon the question of damages! Yet that opinion entitled us to a reversal of the judgment and a new trial, and the Court had no power to grant an affimance for one-half.

The statute of South Dakota referred to (Comp. Laws, Sec. 5238), authorizing the modification of judgments by the appellate tribunal, has never been applied in that State, or in the States having like statutes, to a case like this—a general verdict, in an action for damages, for alleged breach of contract. Under such statutes the power of an appellate Court to modify in any manner, either absolutely or conditionally, is restricted to cases in equity where the case is tried *de novo* above, or to cases in law where the modification can be made as matter of law and not by weighing evidence (unless the cases of tort to the person, and excessive damages seeming to be the result of passion or prejudice, constitute an exception) ; and a judgment on general verdict, based on conflicting testimony, cannot be modified ; but, if error be found to have occurred, a reversal must be had and a new trial awarded. This distinction is carefully preserved in the decisions; and, if isolated cases are found seeming to constitute an exception, they must be considered in the light of their particular facts or the local statutes. Cases going up on demurrer, or on findings of fact, or special verdict, cannot be used as an illustration.

Mr. Hayne, in his work on New Trial and Appeal, treating the California statute, similar to South Dakota Sec. 5238, after giving illustrations of modification in the class of cases just referred to (equity, judgment on demurrer, special verdict, etc.), adds this important qualification (Sec. 295, p. 889) :

> " But the Court cannot direct a modification, unless a sufficient basis appear for it in the record. It will not act upon mere evidence. The facts must be established by findings or by admissions in the pleadings."

The cases cited in support of the text are not

as strong as ours, as both were tried to the Court and findings made, yet the Court said in one (Carpenter vs. Gardiner, 29 Cal., 165), in answer to respondent's request to be allowed to remit what the Court might think proper:

"The finding does not afford the data for making any apportionment. This could only be done by assuming the functions of a jury, and finding the damages upon the evidence, a duty which is not devolved upon this Court. The entire damages must be remitted or the judgment reversed and a new trial had."

And in the other (Ellis vs. Jones, 26 Cal., 278), where respondent offered to release a portion of the land from a judgment in ejectment:

"If the particular location of the 180 acres appeared either in the pleadings or by the findings, we might order the modification upon the basis of the record, but there is nothing in either showing the location, and we are not at liberty to examine the evidence for the purpose of determining the location as a question of fact. To do so would be to exercise original, rather than appellate jurisdiction."

The New York statute is quite like that in South Dakota, and in this connection the decisions in that State are interesting. In Moffitt vs. Sackett, 13 N. Y., 522, the Court below, not satisfied with a Referee's report, reduced the recovery by $12, on testimony fixing the value of an article at from $12 to $15. The Court of Appeals held this was error, and reversed the case, saying:

"It is undoubtedly competent for a Court sitting at General Term on an appeal from the Special Term, to allow or reject a claim of either party where its extent has been definitely fixed or can be clearly determined; but where the amount is indefinite or uncertain, it cannot be determined by the Court without assuming the province of a jury."

The case of Whitehead vs. Kennedy, 69 N. Y., 462, is also in point, though not nearly so strong as the case at bar, because tried by a Referee and findings made; but the General Term having reversed the judgment and ordered a new trial unless the respondent should stipulate to reduce the damages to $6,000 and interest from the date of the report, and such a stipulation having been filed, and, thereupon, judgment of affirmance entered for the balance, from which defendant appealed, the whole question of the power of the General Term to enter such a judgment came squarely before the Court of Appeals. The Court says (p. 468):

"The question here is, there being error in the judgment of the Referee, which required a reversal, could the General Term, instead of awarding a new trial, determine the amount which the plaintiff ought to recover in the case and render judgment therefor, for this is substantially what has been done. The Code (Sec. 330) authorizes the appellate Court, upon an appeal from a judgment or order, to reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, or to order a new trial. This power must be construed in view of the character and functions of an appellate Court, and of the fundamental principle that questions of fact are to be investigated and determined in the court of original jurisdiction. It is not the appropriate function of an appellate Court to determine controverted questions of fact, and render final judgment upon such determination. This would be substituting another tribunal from that known to the Constitution and laws for the trial of causes. The General Term has the undoubted power to reverse a finding of facts and grant a new trial, if, in its judgment, justice demands it. This is not invading the province of the trial Court, for it simply remits the case for another trial before the Court of original jurisdiction. When in an action upon contract a recovery has been had upon distinct and separate items and claims, and error either of fact or law has been committed on the trial either in respect to one or more of the claims embraced in the recovery, the General Term, if no other error exists, may, in-

stead of reversing the judgment absolutely, reverse it only as to the erroneous items and affirm it as to the residue provided the plaintiff consents to forego his claim to recover them, and the items as to which the error exists are separable and distinguished from the others. This is as far as the well-considered cases upon the subject have gone (citing 18 N. Y., 522; 21 N. Y., 185; 29 N. Y., 400; 54 N. Y., 221; 57 N. Y., 560). But the action of the General Term in this case is not within the principle of these cases. * * * It was not, we think, within the power of the General Term, after having subverted the grounds and facts upon which the Referee decided the case, to proceed to determine upon the examination of the conflicting evidence what amount the plaintiff ought to recover. That question belonged to the trial Court. The General Term had no power to find the facts and direct judgment in accordance with such finding as if the question was before it as an original one upon a *quantum meruit*. We are of the opinion that, having reversed the judgment for error affecting its validity in all its parts, the General Term could not annex the condition contained in the order, and that the defendant was entitled to have a *venire de novo* awarded absolutely. We have not overlooked the cases where, in actions of tort for injury to the person, the General Term has, on appeal from the order of the Special Term, made on motion to set aside a verdict for excessive damages, made a conditional order reversing the judgment and granting a new trial unless the plaintiff would consent to reduce the damages to a specific sum, and affirming it for that amount if the plaintiff should consent to the reduction. * * * We do not intend to disturb the authority of these decisions. But they must be regarded as applicable only the class of cases in which they were made."

So the judgment of the General Term and of the Referee was reversed and a new trial granted.

The power of the Supreme Court of the United States, as defined in Section 24 of the Judiciary Act of September 24th, 1789, and retained as Section 701 of the United States Revised Statutes, would seem to be very broad:

"The Supreme Court may affirm, modify or reverse any judgment, decree or order of the Circuit Court, or District Court acting as a Circuit Court, or of a District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require."

Yet the Supreme Court has construed its power very strictly, as will be seen from an examination of the cases. In cases involving purely questions of law, arising on demurrer to pleadings or evidence, or a question of jurisdiction, or an error in the form of the judgment, and in cases of equity or law tried without a jury and facts found, the judgments have been reversed and remanded with directions to enter a different or modified judgment below. It is not necessary to cite cases in illustration of the practice. But the Court declines to be drawn, even by an agreement of parties appearing on the transcript, into modifying a judgment based on a general verdict. It will not be "led into the exercise of a power so nearly approaching the province of a jury in assessing damages."

Lanusse vs. Barker, 3 Wheat. 101, 148.

"Where there is a case stated, or a special verdict, the Court of Error must not only reverse the judgment if erroneous, but enter a correct and final judgment. But if a special verdict be ambiguous or imperfect—if it find but the evidence of facts and not the facts themselves, or finds but part of the facts in issue and is silent as to others, it is a mis-trial, and the Court of Errors must order a *venire de novo*. They can render no judgment on an imperfect verdict or case stated. * * * No mere agreement of counsel can substitute evidence of facts in place of facts, or require the opinion of the Court on an imperfect statement of them. A writ of error cannot by these methods be con-

verted into a chancery appeal, nor a Court of Error into appellate arbitrators."

Graham vs. Bayne, 18 How., 60.

The E. A. Packer vs. N. J. Lighterage Co., 140 U. S., 360.

The case in 18 Howard recognizes the doctrine that a judgment on general verdict cannot be disturbed by an appellate tribunal, except to reverse entirely and award a new trial. And in N. O. Insurance Association vs. Piaggio, 16 Wall., 378, while construing the verdict as special so as to authorize a modification of the judgment for error in that particular case, the Court says: "Verdicts, it is said, are either general or special, and that if there is error in a case where the verdict is general it can only be corrected by a new trial; and it must be admitted that the rule, as suggested, finds much countenance in the text books; nor will it be necessary to depart from that rule in the present case."

Now, bearing in mind that this case was pending on appeal in the Supreme Court of the Territory at the time of admission, and that it was, therefore, heard on appeal in the United States Circuit Court, as the successor (on the request of the Richmond Company) to the Territorial Supreme Court, could the Court, being of the opinion that reversible error had been committed, nevertheless, look into the evidence, and conclude that if half the judgment were remitted a judgment of affirmance (despite the error) might be entered for the other half? It seem to us clearly not.

## II.

**The Court erred in directing an affirmance of the judgment for one-half the amount thereof, for the reason that, for the many errors assigned in the Territorial Court and made a part of this record, the judgment of the Trial Court ought to have been wholly reversed and set aside, and a new trial of the case granted in the United States Circuit Court.**

This reaches the error assigned as No. 3 in this Court, and presents for consideration those assigned in the Territorial Supreme Court, and which were argued in the United States Circuit Court on the hearing there (Record, p. 122). These will not be followed strictly in their order and many will be merely stated without argument. As a more logical order for their treatment here, that will be first considered which was numbered 16 in the Territorial Court, as it necessitates an examination of the evidence for the purpose of passing on its legal sufficiency, and thereby gets it before the Court for a consideration of the other errors assigned.

(1) *The Court erred in denying the motion of plaintiff in error to direct a verdict in its favor, at the close of the case* (Record, p. 77), *for the reason that the evidence was entirely insufficient to justify any other or different verdict.*

And first it is to be noticed that the agreement proven in the case is of a wholly different kind and with a different party fromthe one against whom the action is brought. This renders the evidence sub-

ject to the objection named in South Dakota Comp. Laws, Sec. 4936:

"When, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning it shall not be deemed a case of variance within the last two sections, but a failure of proof."

Let us contrast the cause of action alleged with the one attempted to be proven, and the one actually proven in this case.

*(a)* The cause of action alleged in the complaint was to this effect (Record, p. 2): That on December 11th, 1882, Dorne, at the request of the Richmond Company, sold and conveyed to it a certain undivided interest in two mining claims, and on that day executed and delivered to it, through its president, a deed therefor, in consideration of which the company promised and agreed to transfer and deliver to plaintiff fourteen thousand two hundred and eighty-five and five-sevenths shares of its capital stock, within three weeks thereafter. That in pursuance of such agreement and as part performance thereof said company had transferred and delivered to Dorne 3,500 shares of said stock, but though often requested had failed and refused to transfer or deliver any more of the stock to Dorne, and there remained due him ten thousand seven hundred and eighty-five and five-sevenths shares. That the company had sold and transferred all its capital stock and thus put it out of its power to comply with its agreement. That the value of the stock was more than $15,000, and Dorne had been damaged in that amount by the company's failure to transfer and deliver to him, and that amount was, therefore, due him from the com-

pany. All these allegations were denied in the answer, except failure and refusal to deliver stock.

*(b)* The cause of action attempted to be proven was an agreement for an amount of stock not definitely fixed, but to be calculated, made with Scrymser, assuming to act as agent for the Richmond Company, and afterwards ratified by it with knowledge of all the facts, but with 7,000 to 8,000 shares of its stock still on hand (Record, p. 52), and very shadowy evidence of damages.

*(c)* The cause of action actually proven was a conveyance by Dorne to Clarence H. Scrymser, personally (who happened to be the Richmond Company's president, but without a particle of authority to contract for it, and not assuming to act for it at all), of the undivided interest in the two mining claims, an agreement on Scrymser's part, in consideration of such conveyance, that he (Scrymser) would obtain and send to Dorne such an amount of stock as would be a fair and equitable compensation therefor, and, if not satisfactory to Dorne, that he (Scrymser) would deed him back the property. It was further shown that Scrymser conveyed the property to the Richmond Company, reported to its directors a part of his agreement with Dorne, and obtained and sent to Dorne 3,500 shares of the stock, as, in his judgment, an equitable compensation for the property purchased from him. It also appeared that Dorne acknowledged receipt of this stock in a letter addressed to Scrymser, expressing his dissatisfaction, but it is not shown that this letter was ever brought to the knowledge of the company. By the uncontradicted testimony, 7,000 to 8,000 shares of stock still remained in the hands of the company at the time of the trial, and it had, through its agent

Mordock, offered Dorne to reconvey the property to Scrymser, that he and Dorne might settle the difference in their own way (Record, p. 74). This offer was conditioned only on his returning the 3,500 shares received by him in February, 1883. This offer Dorne admits to have been made (Record, pp. 34 and 35), but it was not accepted by him, nor was it shown that he ever offered to return Scrymser the stock in exchange for a reconveyance; but two years later he sold this stock (Record, p. 48). This, it is respectfully submitted—with absolutely no competent proof of damages whatever—shows the cause of action as proven in this case. A reference to the record amply sustains this statement. From this it appears (the Court will indulge us if the parties are sometimes referred to as plaintiff and defendant, as designated in the trial court.

In the summer of 1882 J. W. Kyte and J. S. Pennewell were the owners or claimants of two mining locations, known as the Richmond and Eureka mining claims (Dorne's testimony, direct question 7 and following, Record, p. 5). Dorne acquired from them an undivided two-thirds interest in the property, but without any consideration to Kyte and Pennewell except an agreement to develop the property (Cross-examination, question 14 and following, Record, p. 23). The two-thirds was taken by Dorne in pursuance of an agreement between him and Mordock, representing New York parties, to be developed and opened up as mining property—Kyte and Penniwell to retain one-third, Dorne, Mordock and associates the two-thirds. The two-thirds was to be divided among seven or into seven interests. We have only Dorne's statement of the position in which he acted in making this purchase, in-

asmuch as the Court would not allow Mordock to give his version of the matter and show how Dorne held the two-thirds (see Mordock's testimony, question 27, and order of Court excluding answer, Record, p. 74). But it seems, according to Dorne's statement, that he conveyed six-sevenths of this two-thirds, on the 15th or 16th of February, 1882, to the Richmond people, or the Eastern parties represented by Mr. Mordock (Record, p. 23). In the meantime, he had expended some seventeen hundred dollars before he transferred this six-sevenths to the New York parties (Re-examination, question 6, Record, p. 36); but this was all repaid to him by the Eastern parties (Re-cross-examination, questions 4 to 8 inclusive, Record, p. 39)—Mr. Dorne himself contributing nothing. The Eastern people organized the Richmond Silver Mining Company in April, 1882, on a capitalization of 200,000 shares (testimony of Scrymser, Cross-examination, questions 1 to 17, Record, pp. 53-4), and shortly thereafter the Eastern parties conveyed their six-sevenths interest in the mining claims to this corporation. Dorne for some reason, however, did not convey his one-seventh to the company, being, apparently, dissatisfied with the management (see his talk with Mr. Scrymser, as testified to by him in his answer to question 35, direct-examination, Record, p. 7). The company, however, proceeded to acquire other interests, and before the 11th day of December, 1882, when Dorne finally disposed of his interest, the Richmond Company had acquired from Kyte and Penniwell the remaining one-third interest in the Richmond and Eureka mining claims from other parties, and an undivided one-half interest in the Surplus, Fraction, Grand View and Silver Terra (see Scrymser's testimony,

answer to cross-questions 2 and 3, Record, p. 53). For Kyte and Penniwell's interest in the Richmond and Eureka claims, 50,000 shares of the stock of the company were issued, and 50,000 shares were turned into the treasury to be called treasury stock (Scrymser's cross-examination, answer to question 30, Record, p. 55). For the one-half interest in the Surplus, Fraction, Grand View and Silver Terra there was paid 18,000 shares of stock, $9,000 in cash and an additional amount in cash for developments and legal expense, and an agreement made to protect the properties in court against threatened litigation (see Scrymser's cross-examination, answers to questions 45 to 49 inclusive, Record, p. 57). This was about the condition of things when Mr. Scrymser came to Deadwood on the 11th of December, 1882, and the conversation between him and Dorne was had and the contract made, upon which tnis action is brought.

The testimony of the different witnesses as to what occurred on the 11th of December, 1882, when it is alleged the contract was made, is as follows :

Dorne says (direct examination, Record, p. 7) he first had a talk with Scrymser at Deadwood, and Scrymser said, "I have never heard just what your reason was for not wishing to deed your one-seventh over to the Richmond Company," and Dorne's answer was, "I am a little disappointed about the control of this company, if I understand Mr. Mordock correctly." Some further talk was had about the control, and Scrymser assured him that he had been elected president in April and proposed to have something to say about the control and management of the company, apparently satisfying Mr. Dorne and inspiring Dorne's

confidence in him personally, so that Dorne said to him:

"Mr. Scrymser, if that is the situation, and you are competent to control the company, I am perfectly willing to deed to you my interest, or you send me the stock and I will make the deed."

Subsequently Mr. Dorne went to Van Cise & Wilson's office to meet Mr. Scrymser and Mr. Wilson (Dorne's testimony, Record, p. 9), and there, in the presence of Scrymser and Wilson, some further conversation was had, Mr. Dorne testifying that Mr. Wilson there figured out his stock and said it would come to 14,285 shares, but that in the conversation it was stated that he was entitled to one-seventh of two-thirds of the Richmond stock, *less the treasury stock or other stock that had been paid out pro rata for property purchased.* Mr. Scrymser asked him if he would not make a deed at once, as they were in a hurry about getting a patent, and they wanted him (Dorne) to act in co-operation with them. Finally Mr. Wilson asked Dorne if he was ready to make his deed (answer to question 57, Record, p. 10), and Dorne said:

"Yes, if you will guarantee I will come right out of this thing, without depositing my deed in escrow, I am perfectly willing to let it go at that."

As a further statement of the agreement, Dorne had testified (answer to question 41, Record, p. 8):

"My portion was liable for any exigencies, treasury stock or money paid out for protecting their stock or anything of that kind."

Also in answer to question 97, Dorne testifies (Record, p. 15):

"There was this further said in Mr. Wilson's office, that Mr. Scrymser, not being very familiar with the

number of shares or anything of that kind, the number of shares were only approximately, there might have been a few more shares or a few less for some reason, for I did not pay any attention to what property they acquired or anything of that kind, but it was to be one-seventh of two-thirds of that share of the property, whatever that was, share and share alike."

And again in answer to question 98 (Record, p. 15):

"It was figured out incidentally by Mr. Wilson. He endeavored to explain to me why I would not have as many shares by getting one-seventh of two-thirds, less the reservation fund, than if the reservation fund was not in. He explained to me also that I was entitled to my proportion of what was in the reservation fund the same as if I had it, and that would be used for the benefit or exploration in the mine and for other necessary expenses, but the only reservation that I recollect was that if the number of shares—if there was not near enough to the one-seventh of two-thirds after they were returned to me, I need not take them, *and the deed was to be made back to me. Positive understanding to that effect.*"

And again, in answer to question 99 and an inquiry by the Court, Dorne says:

"Mr. Scrymser not being very well aware of the number of shares and details of mining matters—he was entirely ignorant—did not know anything about mining matters at all—so far as business was concerned, he was a very shrewd business man—as he did not understand exactly as to what number of shares, he said that if the number of shares were not satisfactory to me when they were sent to me, why they were to—the company was to deed back to me the original one-seventh of two-thirds. I understood that one-seventh of it would be about 14,285. I thought maybe there might be a few less for some reason or other" (Record, p. 16).

Again Dorne, in answer to question 118 (Record, p. 20), reiterates that Mr. Wilson made some figures of the amount of shares he was to receive, and he concludes (answer to question 123):

"Which was 14,285 shares, if I recollect distinctly. It was the only time that the number of shares was spoken of. Chiefly, the interest was spoken of as my one-seventh interest."

Dorne further testifies that on that day he made a deed to Mr. Scrymser for the property (Record, pp. 11, 12), and that the company had never offered to deed back the property (answer to question 124, Record, p. 20), and that subsequently in a letter from Mr. Scrymser, dated February 14th, 1883, he received certificates for 3,500 shares of stock (answer to question 126, Record, p. 21).

On cross-examination Dorne testifies (answer to question 55, Record, p. 26) that Mr. Scrymser said:

"I have never understood why you would not deed your interest to the company the same as the others did," and Dorne "objected to some of the men in the company; that if they were going to have control of the company I did not wish to be connected with the company at all, and I was a little afraid of them. Well, he explained to me how it was that they would not have anything to say about it particularly, said he was president, and had been elected president about a year before, and that he was out here on this trip to satisfy himself as to how the company stood, and make matters plain to himself so that he would know how to do; that he had put in a good deal of money himself, and they expected him to put in a good deal more money, and that Fox & Company and those men were just as much trouble as I had had before, and that they were eager and anxious to get them out, and that if I chose to deed my one-seventh over the same as the rest had done, *he would get me my stock.* The number of shares were not mentioned at all at that time; *in fact, they never were.* To state and mention the number of shares at that time when the company was not really organized was out of the question altogether; but the one-seventh of two-thirds was the property I held, and that was the property I, not two hours afterwards, deeded over to him—one-seventh of two-thirds."

In answer to question 75 (Record, p. 28) Mr. Dorne reiterates that there was no number of shares mentioned between him and Mr. Scrymser and (question 76) nothing said about the number of shares in the company, except that they had all received theirs, or could have it at any time. He had his, and mentioned one or two of the others; but the number of shares which the others had received was not mentioned, and he had no knowledge how much they had received, and had not figured up his own (answer to questions 80 and 81), and that when Mr. Scrymser said he would have his proportion of stock he had no knowledge of the number of shares it would be. He had never figured in his own (answer to question 82), and that at the time of the talk with Mr. Scrymser *there was no idea in his mind as to the number of shares he should receive* (answer to question 83), and his understanding with Mr. Scrymser was that he should be treated as the others, as their understanding prior to that time had been (answer to question 86). On further cross-examination Mr. Dorne testifies as to the interview at Van Cise & Wilson's office; that Mr. Wilson, Mr. Scrymser and Mr. Hammond were present; that Mr. Wilson opened the conversation; he didn't think that Mr. Hammond heard all that transpired, as he was very indifferent (answer to questions 104 to 107 inclusive (Record, pp. 29, 30), that Mr. Wilson began the conversation, addressing him, and said (answer to questions 109, 110 and 111, Record, p. 30):

"Now, Dorne, Mr. Scrymser wants to know if you can't transfer that deed at once. He says the company is getting a patent and they desire your co-operation. They can segregate you, you must recollect—if you refuse to come in they can segregate you, and, of course,

they cannot acquire your property, but for the sake of harmony and for the sake of having the patent gotten as early as possible, won't you make your deed now?"

Mr. Dorne's answer was:

"Mr. Scrymser and I have had a conversation upon the subject covering the entire ground, and finding, as I do, that Mr. Scrymser's disposition is not as I had thought the entire disposition of the company was, and that *he agrees to protect me*, the only reason why I hesitate to give my deed is that I am not secure about my stock; *if you will guarantee that I will get my stock* similar as though I had placed the deed in the bank, why I am perfectly willing to make out a deed right now."

In answer to question 115 (Record, pp. 30, 31), Mr. Dorne says that Mr. Wilson explained about the amount of stock he was to get, that there had been fifty thousand shares put in the treasury, and Dorne answered:

"Yes, I understand that; that is simply what I had recollected that Mr. Scrymser had said, *that whatever stock they had paid out in acquiring other property or in development work, that was perfectly right.*"

That Mr. Wilson stepped over to his desk right by the window, and, after deducting 50,000 shares for treasury stock and 50,000 paid for the Kyte and Penniwell one-third, left a balance of 100,000 shares to be distributed among the seven members, one-seventh of which was figured out at 14,285. Dorne says that was simply incidental on Mr. Wilson's part, but, in answer to question 117 (Record, p. 31),

"that *that was not stated to him as the number of shares to which he would be entitled*, there was not anything particular said; that he [Wilson] did not dwell upon it at all—it was simply to show me [Dorne] *about* what would be coming to me."

Dorne says further (answer to question 123, Record, p. 31) that Mr. Wilson was entirely indifferent as to what there was about the fourteen thousand shares, whether I got them or whether I did not get them, so far as I could understand. He did this simply as a matter of explanation which occurred to him in his mind, I suppose, at that time. Dorne also admits, in answer to questions 124–5 (Record, p. 21), that there was something said about the company's having obtained other properties and *it would be fair for him to stand his share of such purchase;* but in answer to an anxious suggestion by his own counsel, just preceding question 129, he gives it as his understanding that for these purchases he should not be taxed more for his share than for any other one-seventh. He, admits in answer to questions 132 to 136, inclusive (Record, pp. 32-3), that Mr. Wilson stated to him that his proportion of the stock would depend upon the acquisition made of the other mining claims to some extent; that it might reduce Mr. Dorne's interest, and that the purchase of the Fraction, Surplus, Grand View and Silver Terra mines might diminish the proportion of stock which he might obtain, so that it might be a trifle less than 14,000 shares; but the extent of the diminution was not mentioned, but that *anything over five hundred or one thousand shares had not occurred to him* or they would never have got his deed. Again (in answer to questions 144 and following, Record, pp. 33-4), Mr. Dorne admits that at the interview in Van Cise & Wilson's office he said either to Mr. Scrymser or to Mr. Wilson, or in their presence, *that he would not have anything to do with the company, but that he would, however, deal directly with Mr. Scrymser in the matter,* but he adds

as explanatory that he meant by the statement that he would not act as superintendent or would not take charge of the property or have anything to do with it in that respect so long as that element remained in the company with a possibility of controlling it, and that he did not use that language in connection with the deed he was making for the disposition of the one-seventh interest—that the reason he made the deed direct to Mr. Scrymser instead of to the company was: "I thought that if I was making it to Mr. Scrymser, why, my interest would be protected because he was president and represented himself so, and guaranteed as president and as having—*by reason of having put in considerable money himself, in fact, more than either of the others, and was expected to put in a good deal more,* I let him have it and was overcome in my repugnance to the entire company, and I never meant that I would have nothing to do with the company by not deeding over, simply that I would not be connected with it in any official manner." Mr. Dorne takes back what he said in his direct examination that the company had never offered to deed back the property, and, in answer to questions 152 to 154 (cross-examination, inclusive, Record, pp. 34–5), admits such an offer was made, and that Mr. Mordock, in conversation with him in Deadwood, told him in substance that, if he was dissatisfied, if there was anything he thought was wrong, he could just return his stock and they would deed the interest back to him. He further testifies (answer to questions 155–6) that there was no time fixed in which he was to have his stock; he thinks three weeks was mentioned—but it was to be simply a reasonable time—immediately after he got back.

"It was distinctly understood there was nothing for

him [Scrymser] to do except to get my stock, my one-seventh of two-thirds of stock, and send it to me *or have the deed made back to me.* Q. 156. Mr. Scrymser then *did agree, that if he did not make a satisfactory arrangement for you, that he would send the—give you your title back again ? A. Yes, sir"* (Record, p. 35).

On re-examination by his own counsel Mr. Dorne reiterates (answer to question 37, Record, pp. 38-9):

"No impression was made on my mind or that contingency at all, except, as Mr. Scrymser had my deed as an absolute fact, and I hadn't my stock, a contingency was this: *if my stock did not come, my deed was to come back to me—that was the chief contingency.*"

He admits that he knew there was some cash and stock paid for the four mining properties acquired, and thinks it was $5,000 and 9,000 shares of stock (answer to question 38, Record, p. 39). On recall Dorne testifies (answer to question 1, Record, p. 41) that he told Mr. Mordock, that if the company did not propose to fulfill the agreement under which he let Mr. Scrymser have a deed, to return the deed to him and he would return the stock. On cross-examination, upon his recall (answer to question 88 and following, Record, p. 48), Dorne admits that he had sold and disposed of the 3,500 shares of stock some two years or more after receiving it.

The testimony of the defendant's witnesses agrees in many particulars with that of Mr. Dorne as to what occurred at the interview of December 11th, 1882, although they are all positive that the agreement was between Dorne and Scrymser personally. When Mr. Dorne attempts to deny this his language is peculiar, to say the least, as an illustration (question 149 of his first cross-examination, Record, p. 34):

"Q. You did not state, then, in substance, on that occasion that you would not have anything to do with the company, but that you would make the deed direct to Mr. Scrymser and deal with him personally in the matter?"

His answer was:

"No, sir; 'personally' was never mentioned in the entire conversation at no time."

It will be seen that his answer is a kind of negative pregnant, and every assumption of the question may have been assented to by it except the use of the word "personally."

The plaintiff also introduced as a part of his testimony the letter from Mr. Scrymser to Dorne enclosing 3,500 shares of stock, the letter from Dorne in answer thereto, and the minute of proceedings of the Richmond Company. These in their order are as follows (Record, pp. 16, 17, 18):

NEW YORK, 14 Feb'y, 1883.

"VICTOR DORNE, ESQ., Galena, Dakota Ty.:

"DEAR SIR—I have been in receipt of your letter of date for several days and ought to have replied earlier, but matters here have been somewhat unsettled, and no meeting of the Richmond Co. has been held until yesterday, when the question of settlement with you was duly presented. I stated that you had deeded to me and I to the Richmond Co. your interest in the Richmond & Eureka claims, *you having left the matter entirely with me to get you in payment therefor such proportion of stock of the Richmond Company as would justly be due you, and that it had been stated to you by Mr. Wilson in presence of Mr. Hammond and myself that, as your interest was only in the Richmond & Eureka claims, and the stock now covered the Fraction, Terra & Grand View properties; also, that your stock would be in accordance with a fair estimate on all the claims.* It was determined by the Trustees that the last-named properties by Davy's development were shown

to be worth much more than double the value of the two former claims and hence your proportion of stock was estimated to be 3,500 shares. This stock I herewith enclose.

Yours truly,

C. H. SCRYMSER.

GALENA, D. T., March 5, 1883.

C. H. SCRYMSER, ESQ., New York:

DEAR SIR--I am in receipt of yours of Feb. 14th inclosing a certificate for 3,500 shrs. of Richmond stock, with a statement as to how this number of shares had been allowed me, &c. I regret to be compelled to remind you that this number does not fulfill *your part of the agreement between us*, made in Mr. Wilson's office. Now, Mr. Scrymser, you are not Fox; to evade an obligation of your own make and disown the truth when you meet it. You know (without giving the conversation) that in consideration of my interest *you agreed to send me* $\frac{1}{4}$ of $\frac{3}{3}$ of the Richmond stock, less treasury stock and stock paid out for other property, "and," said Mr. Wilson during the conversation, "You will get a statement as to the number of shares in Treasury, &c." But there is no need to multiply words as to what was understood. I presented your letter & my understanding of the agreement to Mr. Wilson to-day, and he more than coincides with me as to what was plainly understood. If Mr. Hammond paid attention, I have no doubt his impression would verify my own. But surely I need not beg you to set me right in the matter. Independent of other influences, I trust you will see that it is very unfair to hold my interest without giving me the agreed compensation, or returning my interest. Hoping to hear, I am,

Yours truly,

V. DORNE.

NEW YORK, February 6th, 1883.

The Board of Trustees of the Richmond Silver Mining Company met at the office of the company, No. 3 Wall street, at the call of the president, due notice having been given. The following members were present: C. H. Scrymser, Henry Earle, Edward C. Fox, Amos J. Holahan and John M. Mordock. Mr. Scrymser stated to the board that *he had* during his recent visit to

Deadwood *received a deed from Victor Dorne* for his one-seventh of two-thirds ($\frac{1}{7}$ of $\frac{2}{3}$) interest in the Richmond and Eureka mining claims, *the same having been transferred to him personally, he agreeing with Mr. Dorne* to obtain for him in recompense for the said interest such proportion of one-seventh of two-thirds ($\frac{1}{7}$ of $\frac{2}{3}$) of the capital stock of the company, less the treasury stock, as would be a fair equivalent, after deducting the stock paid out, or set aside to secure other mining property; that he had transferred the interest so obtained to the Richmond Silver Mining Company, and asked that the amount of stock properly due for the said interest be figured up and issued in the name of the said Victor Dorne. After discussion, the following resolution was adopted without dissent: Whereas, the Grand View, Silver Terra, Fraction and Surplus claims have been recently added to the company's interests, *involving large outlay of money, to be repaid in stock to the investors*,

Resolved, that after fair consideration and estimate, the treasurer be hereby directed to issue thirty-five hundred shares of stock, as directed by Mr. Scrymser, in payment for said above-named interest.

Adjourned.

J. M. MORDOCK, Sec."

Mr. Scrymser testifies (answer to question 1, Record, pp. 49, 50) in regard to the interview, December 11th, 1882:

"I asked Mr. Dorne if he would deed his interest in the property to the company. Mr. Dorne replied that he would not; that he would have nothing to do with the company. *Mr. Dorne said that he would deed it to me, with* the understanding that upon my return to New York *I was to arrange with the company* for him to receive such stock as he was entitled to, the amount of that stock to be ascertained after my arrival. *I did not name any number of shares that he would be entitled to receive.* I did not name any share or proportion of the capital stock. *I did not at that time know the number of shares that he was entitled to*" (see, also, questions 2, 3, 4, 5).

Mr. Scrymser also further testified in answer to questions 6, 7 and 8:

"I think Mr. Dorne did make mention of some figures. I do not remember the amount. There was nothing said at that time as to how the number of shares that Mr. Dorne was to receive for his property was to be ascertained. *I was to discover what amount of stock was due Mr. Dorne* when I reached New York *and return it to him or his deed.* I was to give Mr. Dorne the stock he was entitled to after I had discovered it, *or give him back his deed. This arrangement between Mr. Dorne and myself was a personal one.*"

Scrymser also testified (see answer to questions 18 and following, Record, pp. 51-2). That the 3,500 shares of stock were issued to Dorne and sent to him by mail, that Dorne acknowledged receipt of them by letter to him (Scrymser), and aside from what that letter contained there had never been any request from Dorne, either of Scrymser or the Richmond Silver Mining Company, so far as witness knew, for a reconveyance to him of his interest in the Richmond and Eureka lodes. Witness had been president of the company since April 5th, 1882, and if, during the time of his presidency, Dorne had demanded a reconveyance of his property from the company or offered to return his stock to the company, witness would have known of it. This witness further testified (answer to questions 9 and 10, Record, p. 51) that he went to Deadwood on his own account and *had no authority from the company to purchase the interest of Dorne* in the Richmond and Eureka lodes at any price. He was not allowed by the Court to answer question 11 as to who paid his expenses. The presumption is he paid his own. On cross-examination (answer to questions 20, 21, Record, p. 54) he says as to his object in going to Deadwood in December, 1882:

"I thought up to that time I had known so little about the affairs of the company that I would go out

there to see if there was a mine there or not. *That was my only object. Before going there I had not thought of purchasing the interest of Mr. Dorne.*"

In regard to the contract Mr. Scrymser testifies on his cross-examination (answer to question 24, Record, p. 54):

"I think that Mr. Hammond first suggested to me that I secure from Mr. Dorne his interest. I had previously seen Mr. Dorne, but the subject was not mentioned."

Then (in answer to question 29, Record, p. 55) as to what occurred in Van Cise & Wilson's office.

"I asked Mr. Dorne if he would deed what interest he had to the company, and he declined to do so, *refusing to have any transaction with the company in any way.* Mr. Wilson, I believe, then said to Mr. Dorne that the company was trying to secure a patent for these claims, but that they could not secure it unless Mr. Dorne's interest was in, and saying that it would be to his advantage to go in with the rest of us and secure the patent. Mr. Dorne still refused, *but agreed to deed it to me if I would get him such stock as he was entitled to,* the amount of which I did not know. Mr. Dorne then gave me a deed which I deeded to the company *with the understanding that when I got back to New York and could discover what was due—figure it up—I was to send it to him, or failing to satisfy him I was to return him his deed.* It was done then and there—he executed the deed and I at the same time transferred it to the company by another deed. That was all done within ten minutes. From the time Dorne arrived in that office until the matter was closed up, I think it was about ten minutes. During that conversation Mr. Dorne mentioned an amount of stock that he thought he ought to receive. I do not remember the amount. Mr. Wilson made some figures at the time he arrived at the amount, but how it was done I could not say. I could not tell now what he based his calculations on, or how he arrived at his figures. I do not know how Mr. Wilson arrived at his figures. I do not think that I either assented or dissented to Mr. Wilson's figures. *I had an understanding with Mr.*

*Dorne, by which I should arrange to give him what stock he was entitled to or return him his deed.* I was to satisfy Mr. Dorne or return him his deed. That understanding was arrived at at the same time that the deed was given."

In answer to cross-question 33 (Record, p. 56), Mr. Scrymser declares himself quite clear in his recollection as to what took place in Van Cise & Wilson's office, and in answer to cross-questions 36-7-8, same page, as to the amount of stock that Dorne was to receive, he says:

"*It was to be left with me.* I was to do the best I could to satisfy Mr. Dorne with stock or give him back his property, and Mr. Dorne conveyed his one-seventh interest in the property to me without any understanding or agreement as to what he was to receive therefor, except, as I have said before, that *I was to satisfy him with stock or return him his deed to the property.*"

John R. Wilson testifies as to what took place in his office in the interview of December 11th, 1892, as follows (see answers to questions 9 to 20, inclusive, of his direct examination, Record, pp. 58-60):

"Mr. Dorne expressed some feeling regarding Mr. Fox and perhaps another member of the Board of Directors of the Richmond Company, and said he would have nothing to do with them, would make no deal or conveyance to them, but *that he was willing to trust Mr. Scrymser in this matter, and said that he was willing to deed this property to Scrymser and trust to him* to protect his interest in the property, and to do what was right and fair. I said to Mr. Dorne, 'You know Mr. Scrymser—you know he is responsible, and if Scrymser will agree if the company won't do what he thinks is right and fair, that he will have them convey this this property back to you.' It was talked of, and I explained to him why we wanted the the title; we were getting ready to apply for a patent, and we wanted the entire title in the mine in the company. Mr. Dorne said he would deed to Mr. Scrymser, and Mr. Scrymser

could deed to the company. They agreed upon it after talking over these points, and it was also talked over with reference to the stock, and I remember it was said—I said to Mr. Dorne, 'It will be easy enough to determine what stock you were entitled to if there was no other property involved;' I says, 'Since the company has organized on this Richmond and Eureka property'—I do not know that anything was said about the Eureka—it was generally talked of as the Richmond mine—'they have acquired several other properties.' I said, 'They have bought the'—naming them—'the Silver Terra, the Grand View, and another property.' I remember of taking a piece of paper. 'Now,' I says, 'if there was no other property involved why it would be plain enough to reach.' I says, 'Fifty thousand shares. The company was organized with two hundred thousand shares. They have put fifty thousand into the treasury. There is one hundred and fifty thousand shares, of which they have given since the time you made this arrangement—they have given fifty thousand to Kyte and Pennywell, and,' I says, 'if there was no other property but the Richmond or the Richmond and Eureka involved the statement would be just like this: You would take a hundred thousand shares—I sat right down and took a piece of paper—you would divide it by seven and each of you would be entitled to one-seventh of one hundred thousand shares of stock. Mr. Scrymser spoke of their having spent money—the sum I don't remember, but it seems to me *something like ten thousand dollars, as I remember—in expenses during that year, which these promoters or incorporators had advanced; he said he had advanced a good deal of money; that they would consider the amount of money expended, the various property put into it, and then make an equitable adjustment of it.* Mr. Scrymser said he had no feeling in this matter, nothing but the friendliest feeling towards Mr. Dorne, and would see that his rights were protected; and it was at that time, I think, that I said in case they would not do what Mr. Scrymser thought was fair that Mr. Scrymser would be responsible to Mr. Dorne for the reconveyance of this property. Two deeds were then prepared, and who prepared them I do not remember—whether I did or whether Mr. Houghton, who was in our office at the time—but two deeds were drawn and one of them was executed by Mr. Dorne, conveying this one-seventh of two-

thirds interest in the Richmond and Eureka to Mr. Scrymser, and one conveying the same property from Mr. Scrymser to the Richmond Silver Mining Company. Mr. Dorne signed one and Mr. Scrymser signed the other. I took both of the acknowledgments at the same time and filed them both—took them both or sent them both to the Recorder's Office at the same time. Mr. Dorne saw the deed which Mr. Scrymser made to the company, and I remember generally that Mr. Scrymser said during this talk that if he could not get a satisfactory settlement of this matter that he thought was fair and just that *he would be responsible for the reconveyance of this property to Mr. Dorne*, if Mr. Dorne would consent; that we could then deed it to the company. Mr. Dorne said, in reference to the number of shares to which he was entitled, that he was entitled to this one-seventh of two-thirds of one hundred thousand shares, *less what would be equitably apportioned or paid out for these other properties, to allow the expenses incurred in the development, purchase or defense of the other property.* I remember Mr. Scrymser stated there about his having advanced ten thousand dollars or having spent some ten thousand dollars, but did not know what the expenses were and could not tell until he got back to New York. That was why he did not make—he said he did not make the calculation at that time. He did not know what they had paid or expended. Mr. Dorne said he was entitled *to one-seventh less these deductions.* Mr. Scrymser agreed and they both agreed on that, and after that Mr. Dorne made this deed to Mr. Scrymser. I said to Mr. Dorne, if there was no other property to be considered, if it was just the organization of this company upon the Richmond and Eureka property, it would be very easy to determine. I sat there and figured out just what it would reach, just fourteen thousand—some fraction about it; I don't remember the exact figures. I says, 'That would end it.' But I says, '*This company now has three or four other properties, and you would be entitled to a pro rata share when these other properties are taken in and the expenses that they have incurred.*' I am satisfied Mr. Dorne concurred with that idea. I do not remember the words he said, but that is what they agreed to."

Mr. Wilson further testifies to the subsequent inter-

view between himself and Dorne in which the contract was restated, and Mr. Dorne assented to Mr. Wilson's recollection of it (see answer to question 29, Record, pp. 61-2):

"I cannot now remember what was said. I remember that we talked it over and Mr. Dorne was complaining and said to me, 'What was the understanding?' I said, 'Mr. Dorne, as I remember, they were to figure this up and you were to have one-seventh of two-thirds of this stock, *less what would be an equitable deduction for these other properties and for the money they had expended,' and Mr. Dorne said that is what they agreed to do.* I said to him at that time that 'I will guarantee to you that Mr. Scrymser will convey your property back to you if they don't do what he thinks is right.' I do not remember the time, but I think it was the next spring that this conversation occurred, and likely when he got this letter about the stock. I can't fix the time."

Mr. Wilson also testifies to another conversation with Dorne in regard to the matter when Mr. Mordock was present (see answers to questions 31, 32, 33, 34, Record, p. 62):

"Mr. Mordock was asking Mr. Dorne—I should judge from what was said that they had been talking about that before: He says, 'Wilson, we want to know what this difference is with Dorne,' and says, 'We want to get at what the arrangement was,' and wanted me to state it to them both, and I stated as near as I could—as near as I have here—the same in effect as I have here to-day—and Mr. Dorne did not dispute it, but they were talking about some differences between Mr. Dorne and Mr. Scrymser. My recollection is that Dorne agreed with me."

On cross-examination Mr. Wilson testified, so far as he was allowed by the cross-examiner (see answer to questions 16 and following, Record, pp. 64-5):

"There was nothing said, except as I remember he says, when they were trying to get him to deed his

property and take his proportionate share of stock, that he was to have an interest in all these other mines—*the Fraction, Surplus, Grand View and Silver Terra, and own his interest*—his proportionate interest—in the treasury stock, and *in making the deductions they figured what expense they had incurred, what arrangements they had made* [here he was interrupted.] I say Mr. Scrymser said they would figure that over when he got back to New York; that he did not have the amount, and they would make an estimate what would be fair" [here he was again interrupted].

And in answer to the following question said in substance that he did not know how the other mines were paid for, whether with treasury stock or cash, and never had known until he heard the deposition of Scrymser read at this trial. In answer to question 25 and following, he succeeded in testifying, with some interruptions:

"The only figures that were made were made upon the basis of the Richmond and Eureka mine, and, as I said, it would be very easy to determine your amount if there was no other property involved. It would be one-seventh of a hundred thousand. I gathered this from the conversation that Mr. Dorne refused to have any dealing with the Richmond Company and he was willing to deed this to Mr. Scrymser. He says, 'I will trust you in this matter and I will leave you to decide and adjust what is an equitable amount of stock for me to receive, *taking into consideration the other properties they have bought and the expenditures they have made and the expenses they have incurred.*"

After further interruptions and questions by the cross-examiner and by the Court, Mr. Wilson succeeded in saying (answer to question 38, Record, p. 66):

"I don't know who paid for these properties. I understand this, that Mr. Scrymser said he had paid out large sums of money, and these others—and that these properties they had bought. I thought, at that time, they had bought these properties, and that Mr.

Dorne would come in on the basis of these different properties that they had bought in to make him, as they considered, on an equitable basis, and Dorne was to come in on an equitable basis."

On re-examination Mr. Wilson stated (Record, p. 67):

"I had not contemplated any definite number of shares that Mr. Dorne was to receive on this property, for Mr. Scrymser said that he could not tell until he got back to New York and figured up the amount."

John M. Mordock testified as to his knowledge of the agreement of December 11th, 1882 (see answers to questions 17 and following, Record, p. 73):

"I was present in the City of Deadwood, in the office of Van Cise & Wilson, some time after these negotiations referred to, but I do not remember the exact time. I think, shortly after—it was before this suit a long time. Mr. Dorne was present. Mr. Dorne and I went to Mr. Wilson's office, he going at my request, he saying the transaction had occurred in the presence of— I said: 'Mr. Wilson, there seems to be some difficulty between Mr. Dorne and Mr. Scrymser over a transaction they had, in which Mr. Dorne deeded an interest in the Richmond claims to Mr. Scrymser. I wish you would state to us, Mr. Wilson, just about what that agreement was between the two, as we desire to avoid any difficulty whatever with Mr. Dorne, and I would like to reach a conclusion in the matter if I can; Mr. Wilson then stated the case, and I don't remember just exactly what he said; Mr. Dorne sat without any dissent or assent whatever to what Mr. Wilson stated. He stated about what he said here yesterday (referring to what Mr. Wilson said on the witness stand in this trial); I do not remember what it was. When he finished his statement he said: 'Mr. Dorne, you will remember that Mr. Scrymser said, and you said that, if he did not secure an amount of stock that was satisfactory to you, *that he would be responsible for the transfer back to you of that interest.*' After that conversation I said to Mr. Dorne: 'Now, Mr. Dorne, our only desire is to avoid any difficulty. *We have had no transaction with you whatever. Your transaction was with Mr. Scrymser. If you will simply send back that 3,500 shares of stock*

*to the Richmond Company, the Richmond Company will deed back that interest to Scrymser, and you and Mr. Scrymser can settle for the transaction for yourselves* (Admitted by Dorne, Record, pp. 34–5). We certainly want no difficulty with you, and we do not want to involve Mr. Scrymser in any difficulty with you.' That was the whole sum and substance of the transaction. Mr. Dorne made no reply of any consequence. He said nothing; he neither assented or dissented. He would not say to me that he would send the stock back, and he would not say that he would not. I did not have any knowledge at that time as to whether he had the stock."

As having some bearing upon the question of this contract, it may be proper here to allude to some other points in the testimony, as follows :

Mr. Scrymser testifies (question 31 direct, Record, p. 52) that the allegation of the complaint that the company had sold and transferred all of its capital stock was not true, as there was still on hand between 7,000 and 8,000 shares. In answer to cross-examination (questions 15 and 16, Record, p. 54) that he and his associates conveyed the six-sevenths to the corporation immediately after its organization, receiving about 14,000 shares each of stock as the consideration, and, further, in answer to question 30 and the following (Record, p. 55), that 50,000 shares were issued to Kyte and Penniwell for their interest in the property—50,000 shares were issued to the treasury called treasury stock. The Kyte and Penniwell stock was issued shortly after the organization of the company in 1882, and witness got his about six months before making of deposition (March 5th, 1885). The stock was apportioned to himself and associates about the same time that Kyte and Penniwell got theirs, and that apportionment was made on the basis of allowing each of them one-seventh of the stock remaining after deduct-

ing the treasury stock and the 50,000 shares paid to Kyte and Penniwell. In answer to question 40 and following of cross-examination (Record, p. 56), he says in substance: The trustees did not own all the capital stock of the company, but held in proportion each one-seventh of two-thirds of the capital stock. Kyte and Penniwell held the other one-third, as he believed. He and his associates, when they transferred their interest to the company, received for it in stock each 14,000 shares, being one-seventh of two-thirds of the capital stock, less stock placed in the treasury of the company, 50,285 shares; but at that time they had not bought the Grand View, Surplus, Fraction and Silver Terra claims, and did not buy them until between September 1st and December 1st, 1882. These were paid for with 18,000 shares of stock, and $9,000 in cash paid direct, and he could not state the amount of cash paid for developments or legal expenses in addition, and also an agreement to develop the property and protect it in the courts and from encroachments of adjoining owners. Witness did not know what had been done with the balance of the treasury stock beyond the 18,000 used in these purchases, 3,500 sent to Dorne, and 7,000 or 8,000 remaining on hand (see answers to questions 54-5 and 6, Record, p. 57). *The $9,000 was not paid with the proceeds of a portion of the treasury stock* (answer to question 51, same page).

As to the notice which the company had of this agreement between Scrymser and Dorne, the following is the testimony:

Mr. Scrymser says (answer to question 12 and following of his direct examination):

"I reported to the trustees of the company individually and orally at first, and afterwards to the

board at a meeting. The board figured up the proportionate amount of stock due Mr. Dorne, and, after getting at the figures, resolved that it be forwarded to Mr. Dorne."

Mr. Mordock testifies, so far as the Court would allow him under the limitations imposed (see answer to question 6 and following, Record, pp. 71–2):

"I was present at the meeting of the Board of Trustees of the defendant company February 6th, 1883. Mr. Scrymser was there and made some statements as to the negotiations or dealings he had with Dorne while in Deadwood. He stated to the meeting, and at the beginning, *that during his visit to Deadwood he had a transaction with Mr. Dorne here individually, and on his own account and authority, which he very much regretted.* Then he stated what the transaction was about, as he has stated in his deposition. Now, I can tell you what the trustees said if you want me to. He said he had a deed from Mr. Dorne to himself individually and personally that he, as an individual, had transferred that to the Richmond Company. He asked the company to give Mr. Dorne such amount of stock as would be a fair equivalent for one-seventh of two-thirds interest in the Richmond claims."

As to the question of any agency or authority on the part of Scrymser to represent the defendant company in his dealings with Dorne, or to bind it in any manner with him, the testimony is as follows:

Dorne testifies (answer to question 55 of his first cross-examination, Record, p. 26) that Scrymser told him he was out here on this trip to satisfy himself as to how the company stood and make matters plain to himself so that he would know how to do. That he had put in a good deal of money himself, and they expected him to put in a good deal more money.

Scrymser testifies (answers to questions 9 and 10, direct, Record, p. 51):

"I went to Deadwood on my own account; I had no authority from the Richmond Silver Mining Company at that time to purchase the interest of Mr. Victor Dorne in the Richmond or Eureka lodes at any price."

In answer to cross-examination question 20 and following (Record, p. 54):

"I thought that up to that time I had known so little about the affairs of the company that I would go out there to see if there was a mine there or not—that was my only object. Before going there I had not thought of purchasing the interest of Mr. Dorne."

And (in answer to questions 59 and 60, Record, p. 57-8):

"I conveyed the interest received from Dorne to the company on December 11, 1882, without any consideration whatever, and at that time there was no agreement between the company and myself that I was to receive any consideration for that conveyance. About February 14th, 1883, the company gave me 3,500 shares of stock for that conveyance."

Mordock testifies (answer to question 16, Record, p. 73) that Mr. Scrymser had no authority whatever to negotiate on behalf of the company for this interest with Mr. Dorne, and Mr. Mordock was at that time (answer to questions 3 and 4, Record, p. 71) practically the managing trustee of the Richmond Company, one of its trustees, its secretary, and the general management of its affairs devolved upon him.

Mr. Wilson testifies on his recall (Record, p. 69) that he had no authority of any kind from the defendant to close any transaction for it with the plaintiff at the time of the interview in his office December 11th, 1882.

The Court itself instructed the jury (see Instruction 1 given at request of defendant, Record, p. 77) that at

the time of the execution of the deed by plaintiff to Scrymser and by Scrymser to the defendant on the 11th of December, 1882, Scrymser had no authority to act as agent for the defendant in purchasing from the plaintiff the property described in those deeds.

It seems to us clear from all this testimony that there is an absolute failure of proof of the cause of action stated in the complaint. The cause of action stated was an agreement made with the defendant to sell it the interest in Richmond and Eureka claims for 14,285 shares of the company's stock. There is not a particle of proof to sustain such an allegation, but all that can be claimed for the evidence, granting the strongest possible inferences to the plaintiff, is that it shows an agreement between plaintiff and Scrymser for a sale to him personally of the mining interests, in exchange for which he was to get Dorne an equitable amount of the defendant company's stock after certain known and other estimated deductions; and, if Dorne was not satisfied with the amount received, he was to be allowed to surrender it, and Scrymser bound to reconvey him the property. Dorne received 3,500 shares from Scrymser in a letter setting forth the substance of their agreement (and which Dorne makes a part of his evidence in this case); then wrote in answer to Scrymser, complaining of the allotment as too small, but he did not offer to rescind, and subsequently sold the stock.

This is a total failure of proof of the cause of action stated in the complaint, and this clearly entitled the defendant to a verdict, as asked at the close of the case. We have already cited and set out the language of Section 4936 of the Compiled Laws of South Dakota

on this subject. The following cases, among many, illustrate the application of the doctrine:

Place vs. Minster *et al.*, 65 N. Y., 89, 192.
Southwick vs. Bank, 84 N. Y., 420, 425–9.
McCord vs. Seale, 56 Cal., 262.
Cox vs. McLaughlin, 63 Cal., 196, 207.
Wilson vs. Haley Live Stock Co., 153 U. S.,

There remain a few other reasons why this motion to direct a verdict should have been granted. If one link in the cause of action stated in the complaint or attempted to be proven was wanting, a verdict for Dorne could not stand. We submit: *(a)* Scrymser was not the Richmond Company's agent in this transaction; *(b)* he did not assume to be its agent; *(c)* he did not report nor did the company ratify his agreement with Dorne; *(d)* getting a deed from Scrymser for the property conveyed by Dorne was not ratification; *(e)* no definite agreement was made between Dorne and Scrymser that could be the basis of an action for damages at all; *(f)* Dorne never offered to exercise the option given him, to return the 3,500 shares of stock and take a reconveyance of the property; *(g)* in keeping the stock and disposing of it, he acquiesced in Scrymser's calculation; *(h)* there was no legal evidence of damages.

*(a)* Scrymser was not the Richmond Company's agent in this transaction. Being its president did not constitute him its agent to buy real estate. And while the rule in some States is that an agent with oral authority can bind his principal in writing for purchase or sale of real property, the rule is different in

South Dakota. The law of that State bearing on the question is as follows (Comp. Laws, Sec. 3607):

"An agreement for sale is either (1) an agreement to sell; (2) an agreement to buy; or (3) a mutual agreement to sell and buy."

Sec. 3544:

"The following contracts are invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged or by his agent; * * * [paragraph 5] an agreement for the leasing for a longer term than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged."

The Court accordingly charged the jury on request of the Richmond Company (Record, p. 77), and again on its own motion (p. 83), that Scrymser had no authority to act as agent for the company in purchasing this property.

*(b)* There was no assumption of agency by Scrymser in this transaction with Dorne. He never undertook at any time to contract for the company. Dorne refused to deed to the company, but would deed to Scrymser, personally, and look to him. His evidence admits this. Wilson's and Scrymser's are to the same effect. Scrymser's letter of February 14th, 1883—his report as recorded in the minutes and Dorne's answer of March 5th, 1883, all introduced in evidence by Dorne (Record, pp. 16, 17), show it to be a personal contract. The mere fact that Scrymser after receiving the deed from Dorne conveyed to the Richmond Company did not indicate assumption of agency on his part. He was bound personally to pay for the property or to

answer for its value in such amount of stock as he thought equitable, and if it was not acceptable to Dorne, then to reconvey. Assumption of agency is a prerequisite to ratification.

Story on Agency (8th Ed.), Sec. 251*a*.
Condit vs. Baldwin, 21 N. Y., 219, 225.
Ellison vs. Jackson Water Co., 12 Cal., 542, 552.

This is not a case where getting title to the property, retaining the fruits, would make the principal liable. The State statute is express on this proposition (South Dakota Comp. Laws, Sec. 3971):

"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing" (Sec. 3972). "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or, *where an oral authorization would suffice*, by accepting or retaining the benefit of the act with notice thereof."

Dorne does not claim that an original agreement was made with the Richmond Company, through Scrymser as his agent. The proceedings and resolution of its Board of Directors, introduced in evidence by Dorne, if intended to show a contract made for his benefit, should have been adopted by him (South Dakota Comp. Laws, Sec. 3499): "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." Possibly he could have brought an action on that resolution for the 3,500 shares if not delivered. But there being no breach in that resolution he repudiates it as a contract in his interest and urges it as ratification of Scrymser's individual transaction with him. It would

seem that defendant, in error, ought to be consistent in something, and if that resolution is evidence for him at all it should bind him by its terms.

*(c)* Scrymser did not report all his agreement, and the company therefore cannot be said to have ratified. Disregarding the statute for the moment, and supposing for the sake of an argument that retaining the title was, as contended for by Dorne's counsel, a ratification, yet was there notice of all the facts, either those alleged or proven ? Scrymser was not the company's agent, says the Court in its instructions, so notice to him was not notice to it. Then where is it shown that the company ever heard of an agreement for 14,285⅝ shares to be delivered in three weeks, as alleged in the complaint ? Where is it shown that there was any dissatisfaction brought to its notice or demand made for more ? Or is there any evidence of ratification of the agreement between Dorne and Scrymser, and was that proven ? Did the company have notice of all its terms ? Was it told that Scrymser was obligated to reconvey if the stock awarded should not be satisfactory to Dorne ? Dorne did not give it this notice or any notice at all. Scrymser did not. His report of the transaction of December 11th, 1882, to the company was very limited (see his testimony, Record, p. 51, and Mordock's, Record, p. 73). The proceedings and resolution recite the extent of the notice that Mr. Scrymser had received a deed from Dorne to himself personally, and that he had agreed to obtain for Dorne such proportion of the one-seventh of two-thirds of the capital stock of the company, less the treasury stock, as would be a fair equivalent after deducting the stock paid out or set aside to secure other

mining property. Then followed the figuring and the basis of estimates contained in the whereas, and a resolution to issue 3,500 shares. But nowhere is there an intimation that, if this is not satisfactory to Dorne, the title to the one-seventh will have to be reconveyed. Nowhere any intimation that Scrymser assumed to act for the company. Ratification can only be made with full knowledge of all the facts.

Owings vs. Hull, 9 Peters, 607.
Bennecke vs. Life Ins. Co., 15 Otto, 355.
Seymour vs. Wyckoff, 10 N. Y., 213, 224.
Smith vs. Troy, 36 N. Y., 79, 84–5.
Davidson vs. Dallas, 8 Cal., 227, 245.

*(d)* But getting a deed from Scrymser for the property conveyed to him by Dorne was not ratification. The ratification to have placed it under any liability should have been in writing under the State statutes already cited (Comp. Laws, Sec. 3971–2). (And it may be said here, once for all, that the statutes cited in this brief as from the Compiled Laws of that State were all in force in the Territory of Dakota also, from prior to December 1st, 1882, until the admission of the State into the Union.) Therefore we can only look to the writing to see what, if anything, was ratified, and the minutes and resolution of the Board of Directors are the only writings we have on this subject. If the acceptance and retention of the deed constituted ratification in writing, the only consideration stated there was one dollar (see Dorne's deed to Scrymser, Record, p. 12, and Scrymser to Company, p. 14). But the obligation of the company must be measured by the proceedings of the meeting of February 6th, 1883 (Record, p. 18). And if these minutes are binding on the company as evidence of ratification, they are binding on Dorne, who

claims as their beneficiary, and he must take under them just what they ratify and no more. If the 3,500 shares had not been delivered, and Dorne had brought an action for specific performance, could he have recovered more? If he had pleaded imposition or fraud and wanted to rescind, could he have done so without returning what he had received? Can his relief be larger in law? Any way we may reason upon the subject only emphasizes the statement that Dorne's contract for any of this stock at all was with Scrymser, personally, and not with the Richmond Company.

*(e)* If not, clearly no obligation was assumed by the company to deliver more than 3,500 shares, and Dorne's action should have been in equity to rescind, or on an implied agreement, under his counsel's contention that one resulted from taking title to the property. But in that event his action should have been for the value of the property conveyed, and not as here on express contract. Nor was there a definite agreement upon any number of shares between Dorne and Scrymser. Dorne left the computation wholly to Scrymser, to be calculated by him on an equitable basis, subject only to Dorne's right to rescind, if the allotment should not prove satisfactory to him. He admits this calculation had no definite basis to stand on; that on his own expectation it would run 500 or 1,000 shares below the 14,285; he admits there were contingencies and equities to be considered; that the amount was not agreed on, because he was left to be satisfied or dissatisfied with the amount that might be made him; he admits the Surplus, Fraction, Silver Terra and Grand View had been purchased by the company after the others conveyed, and before De-

cember 11th, 1882, and that, too, without a dollar's contribution from him. He introduces Scrymser's letter putting them at more than double the value of Richmond and Eureka. Wilson and Scrymser agree that the expense of acquiring these claims, $9,000 cash and 18,000 shares of stock (preferred and protected), and other expenses of development, etc., were to be considered in estimating the amount of stock Dorne should get. The resolution of the Board of Directors so recites. It is to be regretted that the actual method of calculation was not exhibited (the whereas strongly indicates it); but the burden of this issue was on Dorne. Even had he offered to rescind and demanded a reconveyance, he would still have been obliged to show that the award of stock made to him was inequitable and unfair. And in such event he must have offered to return the 3,500 shares received. But under no phase of the agreement could he retain what might be sent him and sue Scrymser or any one else for more.

*(f)* And Dorne carefully never offered to rescind, although by his own testimony that was an option expressly reserved to him in the agreement with Scrymser, if the allotment of shares made to him by Scrymser should not be satisfactory. He declares in his complaint that the defendant has sold all of its stock and put it out of its power to issue him more, but this is disproved by Scrymser, who testifies that some seven or eight thousand shares are still on hand. But Dorne does not want these, he wants money. The position of his counsel seems to be that defendant should have offered to rescind in its pleading, and tendered a reconveyance or something of that kind. But how could it? The contract proven between Dorne and Scrymser

reserved no option to rescind with the latter; the report of the negotiations of December 11th, 1882, made to the Board of Directors in February, 1883, did not advise them of any privilege of rescission in any one; the complaint did not plead such a contract. The only party allowed to propose rescission, by the agreement of December 11th, 1882, was Dorne—this by the testimony of Dorne himself, of Wilson and Scrymser. In the event of the allotment of shares made by Mr. Scrymser to Dorne was not satisfactory to the latter, then he could have his property back—of course, upon demand—and return of the 3,500 shares. Mr. Dorne never made such a demand, either of defendant or Scrymser, or communicated his dissatisfaction to defendant or offered to return the 3,500 shares. According to his testimony he went to work at once to try to sell them. According to his pleading, alleging a wholly different contract from that proven, he held to the 3,500 shares and demanded 10,785$\frac{5}{7}$ more. This he could not do and recover, upon any possible theory of the company being under a contract with him because of the acts of Mr. Scrymser. Supposing Scrymser had assumed to act as agent; supposing the company ratified his contract with Dorne with full knowledge of the provision allowing him to rescind if dissatisfied with the allotment; supposing it refused to issue more stock—yet was it not Dorne's duty to exercise the option and demand rescission before bringing this action? Was it not an absolutely indispensable prerequisite to his having any cause of action at all that this demand should first be made and a refusal had, thus putting defendant in the wrong and making it liable for money? Bearing in mind that by the testimony of Dorne, as well as defendant's wit-

nesses, this was an element in the contract—Dorne was to have a reconveyance of his interest if not satisfied with the stock he received—can he charge defendant with liabillty before notice of his dissatisfaction and its refusal to convey? By the terms of the agreement between Scrymser and Dorne the right of selection between alternative acts (to accept and retain such allotment of stock as might be made by Scrymser, or return it and get a reconveyance of the property) was vested in Dorne. The South Dakota statute on this subject is as follows (Comp. Laws, Sec. 3437):

"If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or if none is so fixed before the time at which the obligation ought to be performed, the right of selection passes to the other party." Sec. 3438: "The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party."

The following cases to some extent illustrate the statute:

Bassett vs. Brown, 105 Mass., 557.
Lobdell vs. Hopkins, 5 Cowen, 516.
Bolles vs. Stearns, 11 Cush., 320.
Root vs. Bonnema, 22 Wis., 514.
Leaird vs. Smith *et al.*, 44 N. Y., 618.

*(g)* His retaining the stock, making no offer to return it, but ignoring Mordock's proposition that the company would deed back to Scrymser and let Dorne and Scrymser settle the matter, and then his subsequently selling the stock, constitute affirmation and acquiescence on Dorne's part that should bar his recovery.

Bassett vs. Brown, 105 Mass., 557.

Cohen vs. Ellis, 52 Hun (N. Y.), 133.
Martinez vs. Mall, 46 Fed. Rep., 724.

*(h)* There was no legal evidence of damages in the case. The statute referred to by the Court as controlling in this case has already been cited (Comp. Laws S. D., Sec. 4613):

"In estimating damages, * * * the value of property to the buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence for him to make such a purchase."

Dorne first touches the question of the value of Richmond stock in his direct examination beginning with the answer to question 128 (Record, p. 21), declaring arbitrarily that he was acquainted with its value in January and February, 1883—that at that time it was chiefly held in New York, some of it held here; he knew of two men who had it, but outside of them he could not say—they were Mr. Kyte and Mr. Penniwell, living at Galena. They owned the stock; he didn't know just where they had it; presumed they had it in their own hands; some of it was held in Chicago (answer to Q. 138, same page); he made an effort to purchase a portion of the stock of Kyte and Penniwell; he knew of very little on the market in Deadwood; thought there was some (answer to Q. 141), and declared the market valve was over a dollar here (see question 143); did not think there was a great deal held in town; could not say how much; did not think there was 10,000 shares held in Deadwood at that time; he was refused

1,500 shares at $1 a share; but on the Court's interrupting him with the question, "Do you know—not what you were refused at?" he answered, "One dollar a share," and in answer to the next question by the Court declared that was the least price it could be bought at in the market. After questions 148–9 (which were not allowed to be answered) the Court put this question: "You may state what was the least price which you could get it for in this market," and Dorne answered, "$2 a share" (Record, p. 22).

In Dorne's cross-examination his attention was first called to the question of values, about question 155 (Record, p. 35). He said there was no time mentioned in which the stock was to be delivered to him. He may have said three weeks—that is his recollection, but it was simply a reasonable time; Scrymser was to send it immediately after he got back; there was nothing for him to do except to get his stock and send it to him or have the deed made back to him. The time he was fixing for the valuation of the stock, on his direct examination, was some time after December, 1882—he would not say how long; it was during the year 1883—it was not in February—when he said the stock was worth two dollars. He meant during the year; not exactly at that time, not immediately on recipt of his stock, but during the year 1883, and he thinks it was during the summer, about June, 1883, two or three months after he had it. At the time he received the stock in February he didn't know whether there was any stock in the market in Deadwood for sale. He did not make inquiries for any. After receiving the stock in February he began to advise himself as to the market value here. Within sixty days after that, probably the first of May,

he had given orders to buy it. Didn't know whether there was any here in the market or not; didn't know of any of that stock being sold here in the market within sixty days from the time he received his stock (see answers to questions 159 to 165, inclusive, pp. 35–6).

"Q. 166. As a matter of fact, up to, say September, 1883, did you know of a share of that stock being for sale here in Deadwood in this market? A. No, sir" (p. 36).

On re-examination Mr. Dorne testified that the stock he tried to purchase belonged to the two parties, Kyte and Penniwell, who lived at Galena, Dakota, and it was there he made the effort and the offer (see answers to questions 1 to 4, inclusive, Record, p. 36).

On re-cross-examination he says (answers to questions 2 and 3, p. 39) he never knew for a fact that the stock of Kyte and Penniwell was a sort of preferred stock, guaranteed free from assessments and expenses, but he had heard of it a long time before he went there to buy it—months before. On re-examination again, plaintiff's attorney being just about to read his Chicago depositions, and hoping to get them in so as to fix Chicago as the nearest market, under Section 1980, asked the following question: "Was there any stock upon the market, except this Kyte and Penniwell stock, nearer than Chicago during the months of January, February, March and April, 1883?" and obtained for an answer what he then wanted, "*No, sir; not that I know of*" (p. 39).

The depositions of these three Chicago witnesses were then read—Vale, Eldridge and Sands—but no testimony as to market value of the stock in Chicago was obtained from either (Record, pp. 40–1).

Plaintiff was then recalled and re-examined as to the value of stock, beginning with question 2 (p. 41). He testified there was not stock on the Deadwood market during the winter and spring of 1883 to the amount of 10,285 shares; at the time he approached Kyte and Penniwell was about June, but they told him they had their stock before that. He did not think there was any stock in this country at that time except his own and theirs. There was none on the market; that was positive. An effort was then made to get him to say what Kyte and Penniwell offered him their stock for, but the Court instructed the witness: "He can state, if he knows, where there has been considerable transactions in it, what it brought in the market; but he cannot cite individual instances" (p. 41), and then, in answer to a question following by his counsel, he declared the stock was worth, not in Deadwood but in New York, a dollar and a half—it would cost a dollar, at his estimate, to produce it in Deadwood. If it was worth a dollar and a half in New York at that time it would be worth in Deadwood two dollars a share! He had the stock sold at a dollar and a half in New York, and had the money, $7,500, for his 3,500 shares and 1,500 shares besides—that was for 5,000 shares. When asked for the date of that transaction, he said it was at the time that he made the trade, a few months after he received the stock from Mr. Scrymser—the 3,500 shares of stock. There were certainly not as much as ten thousand shares of stock in the market, except this Kyte and Penniwell stock, anywhere this side of New York. He had given three or four orders in town to buy the stock and did not seem anybody able to find it; there was not a great deal held in Chicago—there were thousands anyway (Record, p. 42), probably ten

thousand; he could not remember the number; he he only knew from the stock books of the Richmond Company and had no particular interest at the time he examined the books; there was none in the market there that he heard of; he made some inquiries. He gaves orders in Deadwood to buy stock at one dollar a share at the time when he had this deal in New York, some months after he received the 3,500 shares; could not state exactly how many months; waited a reasonable length of time thinking he would get the balance of his stock, and just what time he could not recall. There was no stock anywhere in this country that he could find except this Kyte and Penniwell stock." And upon such a qualification and such degree of familiarity with the value of stock, his counsel put this question 27: "What was the market price of that Richmond Silver Mining Company stock, such as you held, in the City of New York, during the months of February, March, April, May and June of 1883?" to which the witness answered promptly, "A dollar and a half" (Record, p. 43).

On cross-examination following this recall Dorne's fine fiction of a market value of this stock in Deadwood was fully exposed and exploded. He had already admitted that he did not know of a share of the stock being for sale on the Deadwood market up to September, 1883 (Record, p. 36, Ans. to Q. 166). He now admitted on this last cross-examination (p. 43 and following) that his inquiries for stock in Deadwood were during the month of June, 1883; that he gave orders to brokers to and others on the street for an indefinite number of shares, a limit of 1,500 at a dollar a share, but did not bind himself to take that amount, and he then goes on to tell his remark-

able story of a contract with an unknown party in New York City, by mail, through a person named R. A. Marston, who was a mere casual acquaintance, whom he had never met but once, whose present address he did not know, and who contracted for the New York stranger for 5,000 shares at $7,500, sent him a draft therefor, conditioned on his forwarding 5,000 shares of stock and no less; that he put the draft in the safe of attorneys in Deadwood, enclosed in an envelope (denied by both the attorneys, Record, pp. 62–3, and 68); and on failing to get the other 1,500 shares he returned the draft for $7,500 without any effort to sell his 3,500 shares at a dollar and a half a share to the New York party, but retained it and sold it some two years later. The story is so manifestly absured and untrue that the Federal Court below rejected it entirely, in its conclusion that reversible error had been committed in the trial Court upon the question of damages.

This was all the testimony furnished by Dorne on the question of the value of the stock, and it will be seen that not a particle of evidence is given, when his testimony is taken together, of any value earlier than the month of June, and that his so-called value then is based wholly on offers made by him in Deadwood, where to his knowledge at that time there was not a share of stock to be had, for the purpose of filling an imaginary order from New York City, where there was evidently none on the market or it could have been bought there. We respectfully submit that such evidence does not meet the requirements of the statute.

For the defense, Scrymser testified that he owned, either individually or as trustee, between nineteen and twenty thousand shares of the stock; that he had paid for what he purchased fifty cents a share, and

in answer to the question, "Has that stock ever had a market value?" he answered "It has sold at fifty cents per share" (Record, p. 53). Neither time, place nor circumstances of this sale are given. It may have been in London or Liverpool, a month or so before his deposition was taken (March 3d, 1885), and a purely private transaction.

Mr. Mordock testified (answer to Qs. 28 and following, Record, p. 75): "In December, 1882, and February, 1883, or between those periods and along about that time, I was in the City of New York. I think I was there the most of the time. I lived there about that time. *This stock had no market value there.* I say that simply because there was no stock on the market, and because *it was simply a piece of development work*, in which the ownership was represented in stock, the stockholders not desiring to sell any stock to anybody or out in—out on—the market. There was no such stock on the market; no stock offered; the stock had no value there; we hoped to make it valuable by our development." In answer to repeated questions by the Court, seemingly based upon its assumption that the stock must have had some value, the last of which questions was as follows: "I mean, didn't it have some value? Wasn't it worth something in the market? Wouldn't it have brought something upon the market?" Witness answered: "I think if we had gone out and offered people that stock, probably about three or four cents a share, on chance. I didn't know that it had any value at all. I don't think it had, probably."

It will be noticed that in addition to Dorne's fiction of his private sale in New York, and his orders given in Deadwood to fill it, his testimony as to values is other-

wise contradictory. But all of it was based upon or connected with that fiction. He admits the stock was chiefly held in New York, except about ten thousand shares in Chicago, and the Kyte and Penniwell preferred stock at Galena, and that not a share of stock was in Deadwood up to September 1st, 1883, and that his offers for stock were not made until June, 1883, fully six months after his agreement with Scrymser. His evidence on the question of damages was therefore wholly incompetent and could form no basis for a verdict. Scrymser's was equally so in its indefiniteness as to time, place and manner of sale. Mordock was the only witness who testified as to a market value during December, 1882, and January and February, 1883, or within the time fixed by the requirements of the statute, and this was at New York; and although by Dorne's testimony at least ten thousand shares were held in Chicago there was absolutely no showing as to a market value there. The statute cited (South Dakota Comp. Laws, Sec. 4613) fixes the time and place of ascertaining the price which shall constitute the measure of damages, and this is strictly construed.

If authorities are needed on such a plain proposition, the case of Fitz vs. Bynum, 55 Cal., 459, is quite in point. In that case the verdict was for defendant, and on plaintiff's appeal the Court says: "The question of market value of the stock does not arise in this case. It does not appear that the stock had a market value as such. The sales made appear to be only such as the operators could induce their neighbors and acquaintances to take, at prices ranging from fifty cents to a dollar a share as purchasers could be found. As the witness Strong said: 'The stock that I sold (10,000

shares) I sold for about six bits up to a dollar—ninety cents, the most of it—and some at four bits, to elders and preachers. That I gave out of my own pocket to them. I told them so at the time.' Such transactions do not appear to us to give market value to the property sold, but rather *transactions made in order to give an apparent market value.* The price at one dollar per share placed on the stock by the trustees was altogether arbitrary." It would be hard to find a case these comments would more nearly fit than the case at bar. Other cases might be cited, but it is surely unnecessary.

The foregoing submits our reasons, based on a review of the evidence, why the motion for a verdict for the plaintiff in error should have been granted by the trial Court. That motion raised the question of the insufficiency of the evidence as matter of law. Of course, in the State Supreme Court we could have urged also its insufficiency in fact, and we are by no means sure but the Federal Court below could have considered it in that aspect, if it was by law the successor of the Territorial Supreme Court, and upon that point the case of Metropolitan Railroad Company vs. Moore, 121 U. S., 558, would apply. But this evidence was so entirely insufficient in law that it is unnecessary to urge the other proposition.

Having now treated the error assigned as number 16 in the Territorial Supreme Court, committed by the trial Court in overruling the motion to direct a verdict, it remains to treat briefly of other errors in receiving and excluding evidence. And we must here remind the Court of the familiar rule, that when error is committed injury is presumed and the burden is on the opposite party to show it is error without prejudice (Vicksburg, etc., R. R. Co. vs. O'Brien, 119 U. S., 99),

and of the other rule established by the cases cited in the first subdivision of this brief, that when error in law is committed in an action tried by a jury, and general verdict rendered, there must be a reversal of the whole case and a new trial awarded.

(2) It was error to overrule the objections to questions 91, 93 and 94 addressed to Dorne (Record, p. 12) and allow him to give his conjecture and opinion as to the party for whose interest his deed was made, and his belief that Scrymser was getting it for the Richmond Company. This was in violation of so many well-settled rules of evidence, that it seems surprising even a Territorial Judge should allow it. Here are a few: (1) Agency cannot be established by the declarations of the alleged agent; much less by this witness' impressions as to whom he represented; (2) testimony must be confined to facts, and not, in such a case as this, include opinions, conjectures and conclusions; (3) Dorne's deed to Scrymser, personally, was the best evidence of the party to whom his conveyance was made, and this was not an action either to set aside or to reform that conveyance.

(3) It was error to allow Dorne to introduce his letter to Scrymser against our objection (Record, p. 17). It was not notice to the Richmond Silver Mining Company of anything, for it does not appear that its Board of Directors ever saw it. It was a mere self-serving declaration of Dorne's addressed to Scrymser personally, and inadmissible (2 Wharton's Evidence, Sec. 1101, and cases cited). True, this letter was attached to the deposition of Scrymser, taken on the part of defendant, but does that render it competent evidence for

plaintiff? Perhaps; but for this and other errors of the Court the defendant Richmond Company would not have introduced a particle of testimony.

(4) It was error to allow Dorne, in answer to question 112 of his direct examination (Record, p. 19), to say what the six others got for their interest, as he heard it from them. He sues here on a special, not an implied, contract. Further, the circumstances were different when they sold in April, 1892. Dorne contracted in December, 1892, after other property had been acquired and the stock was increased in value accordingly. This was clearly prejudicial, and not cured by the Court's merely saying to the witness, after it was all in, " Then that is not competent " (Record, p. 19).

(5) It was error to allow Dorne to testify in spite of frequent objections (Record, pp. 21–2), to a market value for the stock in Deadwood, when he had not shown any market there, or that he was familiar with it, and admitted he knew of no stock in the vicinity except the Kyte and Penniwell stock held by them at Galena.

(6) It was error to allow Dorne to testify on his recall (Record, p. 41) as to the value of stock in New York and cost of getting it to Deadwood when he showed no means of knowledge on the subject. He admitted there was stock in Chicago, and that was nearer than New York.

(7) It was error to allow Dorne's testimony regarding the put-up sale to a stranger in New York through " R. A. Marsten " after the Court's excluding evidence of " individual instances " (Record, pp. 41–3).

(8) It was error to exclude from Scrymser's testimony the answer to the question 11 : " At whose expense did you go to Deadwood on that occasion ? " (Record, p. 51). It might have been Dorne's ; was probably his own ; but he had a right to say it was not at the company's expense.

(9) It was error to exclude from Scrymser's testimony the answers to questions 28, 29 and 30 (Record, p. 52), calling for the condition of the Richmond and Eureka properties. The letter from Scrymser introduced in evidence by Dorne had alleged the Fraction, Grand View and Silver Terra to be " worth much more than double " the Richmond and Eureka ; it was right to show that developments had proven that estimate correct, and possibly to show the equity of the settlement made by Scrymser for the Dorne interest. Again, it was proper to show that the property had not been depreciated in value, and, therefore, under the contract as proven, Dorne could have been equitably treated by a reconveyance from Scrymser, if he had asked therefor.

(10) It was error to overrule the defendant company's motion to strike out all the evidence of Dorne relating to alleged negotiations for the sale of 5,000 shares of stock with a party in New York, and his alleged efforts to buy stock in the Deadwood market upon his orders at a dollar a share, for the purpose of making such alleged sale or negotiation for sale (Record, p. 67). This peculiar transaction has already been commented upon sufficiently. It was clearly the product of imagination wholly ; within the comments of the California case it was not evidence of a market value, but a transaction had in order to give an apparent market value.

This motion was good, although the evidence had not been objected to when offered.

Pennsylvania vs. Cook, 18 Atl. Rep., 762.

An objection once made need not be repeated to questions of the same kind or calling for the same class of improper testimony.

Dilleber vs. Home Life Ins. Co., 69 N. Y., 256, 260–1.
Church vs. Howard, 79 N. Y., 415, 421.

And testimony that is absolutely illegal constitutes no basis for a verdict, even if not objected to at all.

Montfort's Adm. vs. Rowland, 38 N. J. Equity, 181.

(11) It was error to strike out the answer of the witness Mordock to question 12 (Record, p. 72), and limit him by rulings that follow from telling all that Scrymser reported to the company's Board of Directors as to his talk with Dorne of December 11th, 1882. Clearly this was competent to rebut any theory of ratification by the company. We should have been allowed to show the company's imperfect knowledge of the facts, and that it dealt with Scrymser not as its own agent, but the agent of Dorne. And, as there was evidence tending to show that Dorne made Scrymser his agent, on which the Court based an instruction to the jury (instruction given for defendant No. 5, Record, p. 78), then the declarations of Scrymser as to what Dorne told him in their interview were competent in that view.

(12) It was error to prevent Mordock from answering question number 25 (Record, p. 74), and show that his company was still willing to reconvey the Dorne

interest to Scrymser, that he might reconvey to Dorne or otherwise settle with him. The Court seems to have taken the singular view that the Richmond Company, without any knowledge or information of Dorne's option to rescind, should itself have made an offer to rescind in its answer, and emphasized this theory by an instruction given at Dorne's request (Record, p. 83). How could the company have made an offer to rescind an agreement with Dorne when it denied that it ever made any such agreement?

(13) It was error to prevent Mr. Mordock from answering question number 27, and explaining in what capacity Dorne had held the undivided two-thirds in the Eureka and Richmond (Record, p. 74). Dorne himself had testified on this point fully on direct examination (Record, p. 6) and also on cross-examination (Record, p. 23), and it would seem clearly competent, since Mordock was Dorne's associate in acquiring the two-thirds (Dorne's cross-examination, answers to Q. 31 and following, Record, p. 24), that Mordock should give his recollection of the way in which the two-thirds was acquired and held.

(14) It was error to refuse instruction number seven, offered on behalf of the Richmond Company (Record, p. 78). This instruction correctly stated the local law on the measure of damages, and can only have been rejected because of the addition "that there is no competent evidence as to the plaintiff's damages before you in this action, unless it be the evidence of Mr. Mordock." We candidly say now that we believe that was too generous, and that Mordock's evidence of market value was at too remote a place to fit this case, so long as there was stock in Chicago.

(15) It was error to refuse the instruction numbered eight asked on behalf of the Richmond Company (Record, p. 79). This was to the effect that if the jury should find from the evidence that Dorne refused to deed to the company and would only deal with Scrymser, looking to him to secure him stock in exchange for his deed, then Dorne's contract was with Scrymser, and no matter what the company did thereafter with Scrymser in the premises the verdict should be for the defendant company. This is in harmony with the propositions we have already urged. There was no privity between Dorne and the company; there was no agency, nor assumption of agency, by Scrymser, and hence no ratification by the company, and, clearly, if Dorne contracted with Scrymser and would not contract with the company, as the evidence abundantly showed, then the company was not liable on such contract, and, no matter what it did with Scrymser about the property, that did not make it liable to Dorne, and the instruction should have been given.

(16) It was error to refuse the instruction numbered nine, offered for the defendant company (Record. p. 79). This instruction referred to the option or privilege reserved by Dorne in his agreement with Scrymser, to demand and receive a reconveyance of the interests conveyed if the amount of stock sent by Scrymser should not be satisfactory to him, and directed the jury that they could not find that the company ever ratified the agreement between Scrymser and Dorne, unless this provision in regard to the option was communicated to the company and understood by it to be a part of the agreement at the time of any supposed ratification. This was clearly

the law. That option was a material part of the agreement and if all the other evidence essential to ratification had existed the suppression of this feature of the contract or failure to communicate it would have been fatal.

(17) It was error to refuse instruction numbered ten offered on behalf of defendant company (Record, p. 79). This raised the option feature in the contract again, and directed the jury that if they found such element of option in the agreement, and further found that plaintiff was not satisfied with the amount of stock he received, it was his duty before bringing this action to return or offer to return the same to the company with a demand for a reconveyance to him of the property conveyed, and unless it should be found that he had done so, he could not recover. This ought to have been given, for reasons we have already fully stated.

(18) It was error to give the instruction numbered three, asked on behalf of Dorne (Record, p. 80). This instruction is quite lengthy and is bad in several particulars: (1) It presumes that Scrymser being president of the defendant company made him even presumptively an agent; (2) while conceding that the jury might find Scrymser had no authority to purchase or accept conveyance of the property, yet it treats his subsequent conveyance to the company, without the payment of any new or different consideration, as a species of ratification, omitting the element of the assumption of authority entirely; (3) it defines ratification as "accepting the transfer and conveyance of the property with knowledge of the terms and con-

ditions which the said company was to reimburse the said Dorne for the said property"—a singularly limited knowledge of facts indeed; (4) it omits any reference to the option reserved to Dorne in the agreement; (5) it grossly misstates the agreement made between Dorne and Scrymser, giving it as an exact amount of stock, whereas, by Dorne's own evidence this was uncertain and left to be calculated by Scrymser. It is too absurd for argument to claim that a president of a corporation, merely by virtue of his office, can contract for his corporation. He must have authority by statute, by-law, resolution or letter of attorney, like any one else.

Adams vs. Wright, 14 Wis., 355–6.
, 37 N. J. Law, 98, 102.

(19) It was error to give the instruction numbered five, on behalf of Dorne (Record, p. 81). This is equally bad with number three: (1) It assumes that Scrymser's presidency of the company gave him some kind of agency; (2) assumes a contract for sale of the property *through* Scrymser to the company; (3) assumes the agreement to be for an absolute amount of shares of stock; (4) but, while conceding the jury might find Scrymser was not authorized to make such agreement, yet omits the important element of assumption of authority by him, and gives it to the jury to find ratification without it; and (5) assumes that issuing 3,500 shares to Dorne was a *part* payment.

(20) It was error to give instruction numbered six on behalf of Dorne (Record, pp. 81-2). This is a long one and altogether bad. It assumes a conveyance by Dorne to Scrymser, "the then president of the defend-

ant corporation, with the understanding and agreement between them that said Scrymser should convey and transfer the said property to the defendant corporation," and an agreement from Scrymser to procure from said corporation, as a consideration for the transfer and conveyance of said property to him and from him to the company, of a definite number of shares, and that if Scrymser communicated this agreement to the Board of directors of the company, and conveyed the property to the company, and the Board ratified the agreement and "accepted title to the property, with full knowledge of the consideration which was to be paid by the company therefor," then Dorne was entitled to recover. This is another most singular statement of the elements essential to ratification. In number three, ratification is based on "knowledge of the terms and conditions which the said company was to reimburee the said Dorne for the said property" (if anybody knows what that means), and now, in number six, ratification is based on accepting the title "with full knowledge of the consideration which was to be paid by the said company therefor." This instruction, like the others, omits the element of the assumption of authority, and the necessity of a communication of the option feature of the agreement to the company. It makes a hypothetic statement of Scrymser's agreement with Dorne which is not based on the evidence in the case at all. An instruction must be based on evidence.

Davis vs. Patrick, 122 U. S., 138.

(21) It was error to give instruction numbered seven asked on behalf of Dorne (Record, p. 82). This correctly stated the law on the measure of damages, but imposed an impossible condition when it required the

jury to "take the price as you find such price from the evidence in this case," for there was clearly no legal or even intelligent evidence of damages at all, unless Mordock's attempt to testify, in spite of the Court's interruptions, that the poor, insignificant mining claims were stocked up for prospecting purposes only; that the company's stock had no market value whatever, but they hoped some day to make it valuable by developing the mines. (How many have cherished that fond hope, let the melancholy holes on the hillsides of Colorado, Dakota and other Western States and Territories tell!)

(22) It was error to give instruction numbered eight, asked for Dorne (Record, p. 82, following seven). This directs the jury not to consider the question whether or not the Richmond company had offered a reconveyance to Victor Dorne, because not pleaded—probably to destroy the effect of Mordock's testimony on this point—that when he first heard of the option element in the contract, he offered that the company would reconvey to Scrymser, in order that he and Dorne might settle the matter. Upon our theory, not only was all such evidence proper, but the burden was on Dorne, if there had been any ratification or contract by the company, to show he had notified it of his option and demanded rescission. This has already been fully considered.

(23) Instruction numbered three, given on behalf of Dorne, being his first instruction (Record, p. 80), is in conflict with instructions numbers one and two, given on behalf of the Richmond company. These ought to be arrayed side by side, in order to be seen and appreciated by the Court. Instruction numbered one, given

for the Richmond company, makes the assumption by Scrymser to act as agent a necessary condition precedent to any ratification by the company, and, equally necessary, a full knowledge of all the facts constituting the agreement between Scrymser and Dorne; and the second instruction following the language of the decision in Bennecke vs. Life Insurance Co., 105 U. S., 355, provides that ignorance, mistake or suppression of any of the essential circumstances relating to the contract between Scrymser and Dorne, would discharge the Richmond company from any liability, by reason of any supposed adoption of or assent to the contract made by Scrymser. The instruction given for Dorne ignores these important elements and bases ratification on "accepting the conveyance of the property with knowledge of the terms and conditions, which the said company was to reimburse the said Dorne for the said property." The rule in regard to conflicting instructions is laid down by Judge SEYMOUR D. THOMPSON in his work on "Charging the Jury," Section 69:

"The giving of inconsistent instructions is error, for the reason that the jury will be as likely to follow the one as the other. Therefore, an erroneous instruction is not cured by another instruction on the same subject which is correct, unless the former is, by the latter, specifically withdrawn; and this is especially true of a correct general instruction, coupled with an erroneous specific instruction. The latter is obviously not cured by the former. * * * The practice of requiring the Judge to give or refuse instructions requested, without alteration, has a direct tendency to lead to the giving of contradictory instructions. A fair-minded Judge, having given instructions for the plaintiff, drawn, as they generally are, in strong language, will be naturally desirous of presenting the other side of the case to the jury in language equally forcible and in a light equally favorable to the defend-

ant. In the hurry of a trial there will not be time to weigh accurately the effect of the conflicting instructions asked for; and the result will be the giving of instructions which contain contradictory propositions of law. It is a sad thing for the Judge to be drawn so far into this habit as to deserve at the hands of the appellate court such a reproof as this: 'In the present case the law commissioner seems to have thought that he was acting with becoming fairness and impartiality when he gave all the instructions asked by both parties, involving the opposite sides of the same question of law. * * * It is to be regretted that that such a course should be pursued. Let him give such instructions only as are consistent with his own opinions of law, and then, at least, he will not expose both parties to the danger of a reversal, whichever way the trial may result! An erroneous instruction given for one side is not cured by one that is more accurate given by the other side."

(24) Instruction numbered five, given for Dorne (Record, p. 81), is also in conflict with instruction numbered one, given for the company (Record, p. 77), in that the latter makes assumption of authority by Scrymser and ratification with full knowledge of all the material facts constituting the agreement, essential to recovery, while the former lamely states the question of assumption of agency, misstates the agreement made, making it certain where it was uncertain, and, admitting want of actual authority, yet obligates the company if

" with full knowledge of the facts [What facts?] it ratified such agreement [the hypothetical imaginary agreement, not in evidence at all] and received the title to said property and has paid thereon a part of the consideration, to wit, 3,500 shares," etc.

This was very prejudicial to the defendant company.

(25) Instruction numbered six, given for Dorne (Record, p. 81), is in conflict with instruction numbered

three, given for the defendant company (Record, pp. 77–8). In the latter, the Court squarely instructed the jury, that if Scrymser, in the purchase of December 11th, 1882, was acting in an individual capacity and on his own personal account, then the question of ratification need not be considered at all, but a verdict be returned ior the defendant. The former does not state agency or assumption of agency on the part of Scrymser, but declares as enough to support recovery, "if the jury find that Dorne conveyed the property to Scrymser, the then president of the defendant corporation, with the understanding and agreement between them that the said Scrymser should convey and transfer the said property to the defendant corporation, and that the said Scrymser then and there agreed to procure from the said defendant corporation, as a consideration for the transfer and conveyance of said property to him, the said Scrymser, and from said Scrymser to the defendant a number of shares of the capital stock, etc. (here caulculated according to counsel's theory), and that the said Scrymser communicated this agreement to the Board of Directors of the said corporation, and conveyed to said corporation the said property, and the said board ratified said agreement and accepted the title to said property with full knowledge of the consideration which was to be paid by the said company therefor." This was most dangerously misleading as well as in conflict with the other. There is no assumption of authority suggested unless in the fact of Scrymser's presidency of the company. All else is perfectly consistent with Scrymser's contract being purely personal and individual, to accept title to the property, convey to the company and procure from the company a stated consideration, yet in this instruc-

tion the communication of such agreement to the company, and its taking deed from Scrymser with knowledge of the consideration he agreed to get from it, binds the company, while in the other, if Scrymser in his purchase of December 11, 1882, was acting in an individual capacity and on his own personal account, then the question of ratification should not be considered at all.

(26) This instruction numbered six, of Dorne's, is also in conflict with instruction numbered five given for the company (Record, p. 78). The latter instructs the jury that it Scrymser was agent for Dorne in this transaction, and agreed to procure certain stock from the company, but failed to comply with his agreement, then Dorne's action, if any arose, would be against Scrymser and not the company. The Dorne instruction just cited is entirely consistent with Scrymser's being Dorne's agent, yet makes the action of the company in taking title to the property, and not helping Scrymser to carry out his agreement with Dorne, subject it to a liability directly to Dorne!

(27) Instructions numbers three, five and six given for Dorne are confused and in conflict with the instructions given on behalf of the company, and with the charge of the Court. Dorne's instructions are all open to the objection of not fairly stating the contract proven in this case, of omitting any reference to the option provision, assuming the contract with Scrymser, and as reported to defendant, to be for a definite number of shares, where it was indefinite, omitting any reference to the question of assumed agency or knowledge of the option provision in the so-called ratification, and in other respects they are not the law.

(28) The Court erred in its own charge to the jury (Record, p. 83) upon the question of ratification, and exception was taken (same page) and error assigned (p. 127) to the second sentence, from the words beginning "But if you believe" down to and including the words "directly with it." It will be noticed the Court adheres to its positive instruction already given for the company, that there was "no evidence that Scrymser had any authority to make this deal or transfer of property with Dorne" (a little uncertain, it is true, but meaning no authority from the company), and yet in the very next sentence it is said, "But if you believe from the evidence that said Scrymser assumed to act in behalf of said company, *and did act*," etc. (How could he act for it without authority?). And, then, how loose the expression, "with full knowledge of the facts" (What facts?), and "ratified the transaction (What transaction?). Nor is this cured by the addition, "But if you believe I say, from the evidence in this case, that the transaction was not made on behalf of Scrymser with the plaintiff in behalf or for the use and benefit of the company, but was an individual transaction between Scrymser and Victor Dorne, then no subsequent ratification by the company can avail the plaintiff in this case." Though this charge was probably intended to harmonize the contradictions between the instructions just given at request of the parties, yet it seems to us, instead, most unhappily to increase the conflict and confusion, and leave the jury more in the dark than ever. It only emphasizes once more the error of overruling the motion for verdict. The duty of the Court was plain. The question of ratification was one of law in this case, and when the Court declared Scrymser acted without

authority from the company on December 11, 1882, it was bound to construe the proceedings of the company of February 6, 1883, as neither a contract with Dorne nor ratification of any contract made by Scrymser with him. As under South Dakota law ratification in this case could only be in writing, this was the only evidence on the subject, and with the meaning or effect of this the jury had nothing to do, but it was wholly for the Court.

2 Parsons on Contracts (6th Ed.), 492.
Auffmordt vs. Stevens, 46 Conn., 411.

(29) The overruling of the motion for new trial is the last error assigned in the Territorial Court. The principal grounds stated for this motion have already been considered. The verdict is alleged to be against law, in that it is clearly against the instructions given by the Court at request of defendant company. Nothing but the conflict in instructions and the Court's confused and confusing charge could have induced such a verdict. But we allege also, as error occurring during the trial, the irregularities in the proceedings of the Court by which the defendant company was prevented from having a fair trial. These were of three classes: *(a)* failure to rule on objections made, *(b)* improper questions by the Court, and *(c)* changing its rulings to defendant's prejudice.

*(a)* The failure to rule on objections is illustrated by the notations in the record of "ruling reserved;" sometimes by no entry at all (Record, pp. 7, 14, 16). Possibly we should be considered as having an adverse

ruling and exception, but this way of treating objections of counsel is severely condemned.

Hayne on New Trial and Appeal, Sec. 86.
1 Thompson on Trials, Sec. 675.

*(b)* The Court put to the witnesses a number of questions of its own, usually leading and suggesting the kind of answer expected or desired, and often indicating its own view of the facts in controversy. This is illustrated without quoting its words, by reference to the record (Questions to Dorne, pp. 13, 14, 16, 31; to Wilson, 64, 65, 66; to Mordock, 73, 75). We believe the rule is that the Court's questions are excepted to without an interruption. And these questions, indicating often the Court's view of the facts, were very prejudicial. Such practice is not favored.

Hayne on New Trial and Appeal, Secs. 38, 121.
1 Thompson on Trials, Sec. 219.

*(c)* The most serious phase of this part taken by the Court was that its questions often came in as a radical change of its own ruling on questions vital to defendant in the case. As an illustration: To question 129, asked witness Dorne (Record, p. 21), "What was the market value of this stock of the Richmond Silver Mining Company at that time at Deadwood or any other point where it was held?" an objection was sustained and plaintiff excepted. To question 140 (p. 21), "Did you offer them [Kyte and Penniwell] a price for their stock?" an objection was sustained. To question 146 (p. 22): "What did Kyte and Penniwell ask you for theirs?" An objection was sustained. And then almost immediately he was allowed to answer what he thought the least price the stock could be bought at in

the vicinity, putting it at one dollar (purely imagination as his evidence afterwards showed), and the Court asked, "That is the best price it could be bought at in the market?" Here he answered a dollar a share. To almost the same question from the Court later (Record, p. 42) he answered two dollars a share, and after specific ruling from the Court excluding individual instances (p. 41), was allowed to tell the New York story, necessitating the long cross-examination to expose it, and then, notwithstanding the Court's condemnation of "individual instances," it refused to strike out this story.

Defendant had a right to believe it would be stricken out. It was an "individual instance" pure and simple, either a preconcerted plan, in June, 1883, to make an apparent market, or a story invented on the witness stand, on the spur of the moment, at the trial. To leave this story before the jury was a complete facing about in the Court's view of the law, too late for defendant to help itself. Witnesses could not be reached to contradict, and the story had to go uncontradicted, in all its glowing colors; but afterward contradicted in every material detail by affidavits set out with the motion for new trial. No such man as Marston or Marsden on the New York directories. No inquiries for stock of Kyte or Penniwell. No efforts to buy of Cranstoun or Howsley.

## III.

**The Circuit Court erred in declining to consider these affidavits.**

It took the position that under the Seventh Amendment to the Constitution it was precluded from considering them. We excepted to the ruling (Record, p. 154) and assigned it as error (p. 157). In this case the United States Circuit Court would have had original jurisdiction had there been such a Court at the time the action was brought; it had reviewing jurisdiction by virtue of the act admitting South Dakota into the Union. Was it then any more forbidden to follow the State practice and consider these affidavits, than the General Term in the District of Columbia was to consider the weight of the evidence in the case already cited (Metropolitan R. R. Co. vs. Moore, 121 U. S., 558)? The Court there quotes the language of the Seventh Amendment and says such a practice in the appellate courts is *perhaps* forbidden by it; but from what follows it would seem to regard the trial Court as not bound by any such limitation on a motion for new trial of a case heard before it originally, and in that view holds the General and Special Term in the District to be the same Court. Now, was not the United States Circuit Court, in this instance, simply rehearing the motion for a new trial, in a case which it might have tried itself, if in existence when the action was brought? The Territorial or State Court could have considered these affidavits under the local statute in force at the time. Compiled Laws South Dakota, Sec. 5088:

"The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party: * * * 4. Newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." Sec. 5089. "When the application is made for a cause mentioned in the first, second, third and fourth subdivisons of the preceding section, it must be made upon affidavits."

It would seem, therefore, that the liberal rule applied by this Honorable Court in the case just cited, applied to the appeal from Special to General Term in the District of Columbia, should be applied to the case of a rehearing or review by the United States Circuit Court of a case tried in the Territorial District Court, though pending on appeal in the Territorial Supreme Court.

The anxiety of counsel for defendant in error to exclude these affidavits from the consideration of the Circuit Court upon the hearing there can well be understood and explained by a cursory examination of their contents. Dorne, in his story of the private transaction for the benefit of some unknown purchaser in New York, through a chance acquaintance he had met but once, and whose address in New York at the time of the trial he did not know, referred also to his efforts to purchase the Kyte and Penniwell stock and offers or orders to brokers Cranstoun and Howsley in Deadwood. His testimony that he made offers to Kyte and Penniwell for their stock (answer to Qs. 139 and 140, Record, p. 21, and to Qs. 3 and 4, cross-examination, Record, p. 41, and Q. 115, Record, p. 49, and Qs. 1, 2, 3, 4, Record, p. 36), and his further statement that he was informed by Kyte or Penniwell, or both of

them, that they had sold out and would sell more stock easily at prices of three or four dollars a share (answer to Q. 48, Record, p. 48), are denied explicitly and emphatically by Kyte in his affidavit (Record p. 100) and by Penniwell in his (Record, p. 107), and both testify that through the friendly efforts of Mordock, late in 1882 or early in 1883, they had sold out their stock, or 30,000 shares of it, at ten cents a share. Dorne's further statements that he had given orders for stock to brokers Howsley and Cranstoun (answer to Q. 8, Record, p. 43 and following) are expressly denied in the affidavit of Howsley (Record, pp. 100–1), who shows that he was not in Deadwood at all in 1883, or until June, 1884, when he first came to Deadwood, and also by Cranstoun (Record, pp. 107–8), who declares in his affidavit that he was not in the stock business at all prior to 1886, nor acquainted with Dorne to his recollection until the fall or winter of 1886, when he had a stock transaction with him, which was the first and only stock transaction he ever had with Dorne, and that Dorne never left any order with him for Richmond Silver Mining Company stock in 1883 or at any other time. Further, Dorne's interesting narrative about Marston, the broker or middleman in New York, who negotiated the sale of five thousand shares of stock for him there (Record, pp. 46-7), is exposed and proven false by the affidavits of Earle (Record, pp. 104 and 108), Scrymser (p. 105), and Holahan (pp. 106 and 113). The stenographer had first taken the name as given by Dorne in his testimony as R. A. Marston, and Earle, Scrymser and Holahan searched the directories of New York in vain for such a name from the years 1881 to 1886, and one of them to 1889. Two of these men had been members of the Stock Exchange, but never heard

of such a man. They found several persons of the name of Marston, but none of them knew R. A. Marston, or had ever heard of him, although Earle made particular inquiries as to that (Record, p. 108). Then Dorne came back, saying the man's name was R. A. Marsden, in an affidavit resisting the others (Record, pp. 109–10). And Holahan diligently made inquiries again through directories, of stockbrokers and of other people, and failed to find anybody that ever knew the man (see Holahan's later affidavit, Record, pp. 113–14). The supporting affidavits which Dorne gets from Stewart, Toby and W. L. Stewart, Elliot and Delaney are quite amusing in what they omit. S. S. Stewart met Dorne in New York in the summer of 1883, knows that a large amount of mining-stock sales was carried on by persons not members of the New York Stock Exchange. The joint affidavit of Stewart, Elliot and Delaney is to the same effect (Record, pp. 112–13), except they do not say that they ever met or heard of Dorne, while the affidavit of Tobey says he met Dorne in the summer of 1883, and remembers hearing him mention at that time the name of one Marsden in connection with some mining property, "concerning which affiant understood that the said Dorne was having some dealings with the said Marsden." But Tobey does not say that he ever knew Marsden, nor does Stewart in his affidavit (Record, p. 11) or in the telegram Dorne sets out from him (Record, p. 110). So these affidavits make it worse for Dorne instead of better. They show he was in New York in the summer of 1883, and to Tobey alone he mentioned Marsden's name. If he was there that summer, why didn't he go to see the Richmond Company and its directors, and make his demand on them, if he had any? Or why didn't he try Scrysmer and make

him reconvey the property? Or why didn't he try to buy stock there to help his friend Marsden fill that order? A likely story, indeed!

These affidavits disclose material testimony in contradiction of Dorne's story of his New York deal, and his offers to Deadwood brokers, which was allowed to stand as competent; and the affidavits of attorneys Kingsley and Van Cise (Record, pp. 87, 102, 103) show all the essentials required in this practice—that the evidence was discovered after the trial was not cumulative, that diligence had been used in preparing for trial the affidavits of the new witnesses obtained, and that a different result would probably be reached on a retrial (Hayne on New Trial and Appeal, Secs. 88-93). To support the last element the affidavit of four jurors was also offered not to impeach their verdict, but to explain it and show that it was based wholly on Dorne's estimate of a dollar a share offered by him to Deadwood brokers in June, 1883 (Record, p. 101).

The affidavits of the attorneys disclosed, also, another interesting feature. After the trial, continuing a search ineffectual before, they discovered some old evidence of Dorne's, given in another case and carefully laid away, and they set out a copy of it in their affidavits, showing Dorne's estimate of the value of this stock on April 1st, 1884 (Record, p. 94). There he first denied selling his one-seventh of two-thirds, because he "never owned it to sell," then admitted the pending action against the Richmond Company for its value, and tried to reconcile the statement that he did not own the interest by saying:

"Because when I originally came into possession of it, the possession was put in my name, although it belongs to other parties; other parties furnished the

money and agreed to furnish any further necessary means that would be used in the enterprise" (this lawsuit).

"Q. 64. You have received, have you not, from the Richmond Company, a certain number of shares of their stock? A. Yes, sir. Q. 65. What was the value of those shares that you received? A. I have no idea. Q. 66. You had an idea when you brought that suit, had you not? A. I founded my idea on reports. Q. 67. On the 20th day of September, 1883, you claimed to know that those shares had a certain value, did you not? A. Yes, sir; I tried to make some inquiries, and I based my idea on those inquiries—on the answers to those inquiries—which, however, I have failed to be able to substantiate."

Ah! Where was Marsden then?

In the States new trials are frequently allowed on newly-discovered evidence; otherwise, great injustice might be done. Especially where prior contrary declarations of a party are discovered.

Hoyt vs. B. C. R. & M. Co., 45 Iowa, 217.
Ranis vs. Ballard, 54 Ind., 79.
Chatfield vs. Lathrop, 6 Pick., 417.
Parker vs. Hardy, 24 Pick., 246.
Watts, adm., vs. Howard, adm., 7 Metcalf, 478,

and also where witnesses are produced to contradict declarations made regarding them or particular false assertions of a party.

Sargent vs. Anon, 5 Cowen, 106, 121-3.
Dierolff vs. Winterfield, 26 Wis., 175.
Wilson vs. Plank, 41 Wis., 94.

And, lest counsel contend we should have produced an affidavit from broker Gaston, too (though its absence was fully explained in Kingsley's affidavit, Record, p. 99,

See Knox vs. Bigelow, 15 Wis., 455.

Under the liberal rule adopted in Metropolitan R. R. Co. vs. Moore, cited, we contend these affidavits should have been considered by the Circuit Court below.

In conclusion of this lengthy brief, will the Court pardon the writer for any seeming warmth in discussion; it has arisen from a deep interest in the result. He feels that a great wrong was done in the trial Court, only half righted by the Federal Court, and he earnstly hopes to see a full reversal here. A poor, experimental mining company, struggling for its existence, whose stock was absolutely without value in the market at all, is mulcted in damages by a voluble testifier, trebly contradicted; first, on the witness stand by his own differing statements; second, by the declarations of non-residents he had misrepresented; third, by his own prior declarations. And to-day his administrator comes into this Court to ask an affirmance of a judgment on a cause of action that did not belong to the man while living, and the fruits of which would not inure to the benefit of his estate, now that he is dead.

We respectfully submit, the judgment of the Circuit Court of the District of South Dakota should be reversed, and the cause remanded with directions there to reverse the judgment of the trial Court *in toto*, and award a new trial.

WAGER SWAYNE,
EDWIN VAN CISE,
Attorneys for Plaintiff in Error.

IN THE

# SUPREME COURT OF THE UNITED

OCTOBER TERM, 18[illegible]

No. [illegible]

THE RICHMOND SILVER MINING COMPANY,
Plaintiff in Error,
vs.
SECRETARY, COMMISSIONER, AND REGISTER OF THE LAND OFFICE AT VIRGINIA CITY, [illegible]
Defendants in Error.

In Error to the Circuit Court of the United States for the District of South Dakota.

BRIEF FOR DEFENDANTS IN ERROR.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

No. 220.

THE RICHMOND SILVER MINING COMPANY,
Plaintiff in Error.

vs.

SEBASTIAN KOENIGSBERGER, ADMINISTRATOR OF THE ESTATE OF VICTOR DORNE, DECEASED,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Dakota.

## BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE ESTATE OF VICTOR DORNE, IN ANSWER TO THE BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

*S. S. Burdett, G. C. Moody and Eben W. Martin,*
*Counsel for the Administrator.*

Counsel for the administrator presume that No. 260 of this term will be first heard, because it involves the question of jurisdiction. We have prepared and filed a brief for the administrator in that case.

If this court shall take the view upon the subject of jurisdiction which counsel for the administrator there urge, then, of course, it

will be unnecessary to examine this brief. Otherwise we beg to submit the following

## STATEMENT.

We are not quite satisfied with the introductory statement prepared by the learned counsel who tried this case in the district court of the territory, nor with his presentation of the evidence bearing upon the points made in his brief. We fear the ardor naturally engendered by his effort in the courts below to prevent the recovery against his client has caused him to take an undue partisan view of the condition of the record.

We submit the following as a more comprehensive and fairer statement of the case exhibited by the transcript:

Sometime prior to December, 1882, the intestate, Victor Dorne, was the owner and held the title in his own name to two-thirds of the Richmond and Eureka lodes and mining claims, situated near Galena, in Lawrence County, then the Territory of Dakota

During one or more of his occasional visits to the City of New York, he and six other persons proposed to organize a mining corporation based upon this mining property thus standing in Dorne's name, for which property they were each to receive one-seventh of the capital stock, less what might be agreed to be reserved for the purchase of other property and for the further development of the claims.

This company was organized and called the Richmond Silver Mining Company (the plaintiff in error here) with the capital divided into two hundred thousand shares. Mr. Dorne conveyed to the other promoters six-sevenths of his interest, reserving one-seventh to himself, and the six-sevenths thus conveyed were transferred to the corporation.

In the meantime Mr. Dorne returned to his home at Deadwood, and had acquired some doubt as to whether he would be treated fairly by the other members of the corporation, and up to the 11th of December, 1882, had not made a transfer of the other seventh interest, but was awaiting developments. In December, 1882, Mr. Scrymser, the president of the company, which was a New York corporation, visited Deadwood, where Mr. Dorne was found, in the interest of the corporation and for the purpose of inducing Mr. Dorne to carry out the original arrangement and make the transfer of his remaining seventh interest.

After some negotiations Mr. Dorne agreed through Mr. Scrymser that he would convey the remaining one-seventh of his original two-thirds interest in the mining claims if the company would transfer, set apart and deliver to him the same proportionate number of shares which it had paid for the other six-sevenths, to-wit: One-seventh of the number of shares not otherwise appropriated, so that he would have as a consideration for his remaining one-seventh of the property, the same as was paid for each of the other one-sevenths. The one-seventh thus agreed upon amounted to 14,285 shares. The number of shares thus fixed upon came about in this way: The original capital was divided into 200,000 shares; fifty

thousand shares had in the meantime been paid for the other one-third interest in the Richmond and Eureka mines, and 50,000 shares had been reserved by the company for the purpose of using the same in the purchase of other mining claims and the development of such as the company might own, thus leaving 100,000 shares. One-seventh of this number would be a fraction over 14,285 shares. These were the number of shares which the company through its president and authorized officer, agreed to pay Mr. Dorne for his remaining interest in the Richmond and Eureka properties, which were conveyed to him by Scrymser, and immediately, on the same day, by Scrymser to the company, that being the mode of transfer by Dorne to the company.

This is fully set forth in Mr. Dorne's testimony, commencing on page 5 of the printed transcript. This agreement was made through Mr. Scrymser, the president, in the presence of Mr. Hammond, the superintendent, and Mr. Wilson, one of the attorneys for the Richmond Company, and other parties. The particulars as to the number of shares agreed upon may be found on page 9 of the transcript. Mr. Dorne, in answer to question 54, after stating that Mr. Scrymser, the president, and Mr. Hammond, the superintendent, and Mr. Wilson, one of the attorneys, were present at Mr. Wilson's office in Deadwood, states, speaking of his conversation at that time:

"I said to him (Mr. Wilson) that Mr. Scrymser and I had a conversation and that I had arrived at a conclusion, but the idea of giving a deed had not occurred to me at all. So that after a little conversation Mr. Scrymser asked me if I could not make the deed at once, that they were really in a hurry about getting a patent and placed the necessity of getting a deed upon the ground that they wanted—(Mr. Scrymser used that plea; so did Mr. Wilson)—that they were about to patent their ground and they required this and wanted me to act in co-operation with them, and Scrymser went over the ground and called my attention to the fact that I had said one-seventh of two-thirds was my proportion, and thinking that that was the way I understood it, and he got a pencil and figured it out on a legal cap piece, just how the figures were made—50,000 shares on one side and deducting—that was for the treasury stock—and 50,000 shares for the purchase of the other third in the Richmond Company, and that would leave 100,000 shares to be divided into seven parts On that day Mr. Wilson figured that or said it would come to 14,285 shares. Of course in our conversations we constantly spoke of the one-seventh of two-thirds and he reiterated and stated that that was correct. That was entirely in accordance with my views, that I was entitled to one-seventh of two-thirds of the Richmond stock, less the treasury stock or other stock that had been paid out pro rata for property purchased."

Q. 55. "Was Scrymser there?"

A. "Scrymser was there."

Q. 56. "Did he see those figures?"

A. "He saw those figures."

This conveyance from Mr. Dorne was to Scrymser, but was for the use and benefit of the Richmond Company, was so understood by Mr. Dorne and by all the parties at the time, and as before

stated, Mr. Scrymser immediately conveyed the same to the Richmond Company, the conveyance being drafted by a clerk in the office of VanCise & Wilson, the attorneys for the Richmond Company, and Mr. Dorne, not knowing or heeding whether it was to Mr. Scrymser or to the company, because, as he states and reiterates in his testimony it was for the purpose of conveying the title to the company of his remaining interest in the Richmond and Eureka mines.

Of this number of shares thus agreed to be paid to Mr. Dorne for his interest in these mines, he afterwards received from the company 3,500 shares, and no more, and having made proper demand, the company refusing to deliver to him the balance due, Mr. Dorne brought this action in the district court of Lawrence County, in the then Territory of Dakota, which resulted in a verdict for the plaintiff for what the jury found to be the fair value of 10,785 shares and interest, to wit: For $15,315.70 and judgment was rendered thereon with $60.05 costs.

Mr. Scrymser, the president of the company and a witness for it, testifies, page 56, printed transcript:

Q. 42. "When you and your associates transferred to the company the property which had been conveyed to you by Mr. Dorne, prior to its organization, how were you paid for it, in stock of the company or in cash, and how much?"

A. "We were paid for it in stock each receiving 14,285 shares, being one-seventh of two-thirds of the capital stock, less stock placed into the treasury of the company, 50,000 shares."

It thus appears that each of the other parties constituting with Dorne the seven holders of the Richmond and Eureka mines, received for their one-seventh interest in the same amount of property which Mr. Dorne held and transferred to the company the number of shares which Dorne states was agreed upon as the consideration for the transfer of his interest. There can be no successful dispute from the testimony that the agreement was clear and conclusive, and that the company knew it, Scrymser knew it, all the parties knew it, or that Dorne transferred his interest in this mining property to the company for which he was to receive as a consideration 14,285 shares.

Under some pretense the company only issued to him 3,500 shares, leaving due him 10,785 shares.

But all these facts have been submitted to the jury and have been passed upon by them against the Richmond Company. We suggest it is not, therefore, a proper subject to be mooted before this court.

## POINTS.

### I.

We cannot undertake to follow counsel for the plaintiff in error through his elaborate argument in detail, a typewritten advance copy of which argument has been kindly furnished us. It seems to us wholly unnecessary. The numerous points which are made are included within a very small compass.

The first complaint made is that the circuit court modified the judgment to the extent of requiring Dorne, the plaintiff below, to remit one-half of the verdict, the argument being that inasmuch as the circuit court found cause to modify the judgment in that particular they ought to have reversed it altogether.

We do not think this a subject of complaint by the plaintiff in error.

There is no reasonable question but what the supreme court of the state, had it retained the case, would have had ample authority under the practice to modify the judgment, just as the circuit court modified it. What we have contended for in the case No. 260 is not that power did not exist if the court had jurisdiction at all, but that it was improperly exercised in this case, for the reason that no error can be found in the record which would justify a reversal of the judgment or its modification, and that therefore the plaintiff in error in that case, the defendant here, was unjustly prejudiced by the exercise of this conceded authority.

Of course if the circuit court had jurisdiction of the case, by its transfer from the state supreme court, then its authority in this particular cannot be reasonably questioned. The following cases illustrate the exercise of such authority under the practice in South Dakota and similar practice.

Cady vs. Chicago, M. & St. P. R. R. Co., 5 Dak. 97, 100.
Hayne New Trial and Appeal, sec. 295
Anderson vs. Ryder, 46 Cal. 135, 139.
Freeborn vs. Norcross, 49 Cal. 313, 314.
Clark vs. Dunnam, 46 Cal. 205, 7, 9.
Barnes vs. Jones, 51 Cal. 303, 307.
People vs. Supervisors, 28 N. Y. 112, 116.
Nelson vs. Munch, 9 N. W. Rep. 863, 867 (Minn.).
Burkholder vs. Burkholder, 41 N. W. Rep. 145, 146 (Nebraska).
Schnabel vs. Betts, 1 So. Rep. 692 (Fla.).
Williams vs. Murrell, 13 S. W. Rep. 1075 (Ky.).
Miller vs. Coppel, 2 So. Rep., 807 (La.).
Naw vs. Jackman, 12 N W. Rep. 312 (Iowa.)
Cox vs. Ry. Co., 42 N. W. Rep., 429 (Iowa).

The section of the Code of Civil Procedure under which it is exercised by the state supreme court, is as follows: "The supreme court may reverse, affirm or modify the judgment or order appealed from in whole or in part, and as to any or all of the parties."

Dakota Code Civil Procedure, Sec. 23.
Compiled Laws South Dakota, Sec. 5238.

In the case at bar, however, the court did not arbitrarily modify the judgment, but required the plaintiff to file a remittitur for an amount that would reduce the recovery to the figure testified by defendant's president as the market value of the stock, as a condition of affirmance of the judgment. This is a common practice. It is really an exercise of judicial power in defendant's interest, of which it cannot complain. The following late cases illustrate this practice.

Hazard Powder Co., vs. Volger, 7 Circuit Court Appeals, 130.

Loewer vs. Harris, 6 Circuit Court Appeals, 394.
Railway Co. vs. Wrixon, 37 N. E. Rep., 895. (Ill's.)
Burdette vs. Railway Co., 27 S. W. Rep. 453. (Mo.)
Corcoran vs. Harran, 12 N. W. Rep. 468. (Wis.)
Lombard vs. R. R. Co., 47 Iowa, 464.
Ry. Co. vs. Johnson, 7 S. W. Rep. 378. (Texas.)
Pratt vs. Pioneer Press Co., 28 N. W. Rep. 708. (Minn.)
Roberts vs. Taylor, 27 N. W. Rep. 87. (Nebraska.)
Carlisle vs. Callahan, 2 S. E. Rep. 751. (Ga.)
See also Bank of Kentucky vs. Ashley, 2 Peters, 327.
Kuntz vs. Wallace, 36 Cal. 462, 481.
Chouteau vs. Snydam, 21 N. Y. 179, 185.

The circuit court having taken the place of the state supreme court in this action, we repeat, if it has legally done so it necessarily possesses all the power which the supreme court could exercise.

II.

The plaintiff in error alleges in his argument that the contract for the sale of the property by Dorne was with Scrymser, the president of the company, in his individual capacity, and not with the company through him. The jury has had before it this question and has passed upon it. We assume this court will not undertake to review the evidence to ascertain whether the jury were right or wrong in their conclusion.

Dower vs. Richards, 151 U. S. 658.

Certain it is and undisputed, that Scrymser did not pay and did not agree to pay one farthing for the property, nor did he receive from the company any consideration whatsoever, nor did the company undertake to deal with him in any way. The object and purpose of the conveyance was to transfer the title to the company. Dorne executed the deed for that purpose, and did not know at the time, for he did not observe that his deed ran to Scrymser, nor was it material, for both his deed and Scrymser's deed to the company were prepared at the same time and executed within the same moment. The agreement was not that Scrymser should pay anything but that the company should pay the same consideration as had been paid to the other six promoters for like interests in the same property, to wit: One-seventh of one hundred thousand shares. This the company partially carried out by transmitting to Dorne thirty-five hundred shares, claiming, just for what reason it does not appear, that under the circumstances that would be an equitable division with Dorne. Whereas, it was wholly inequitable and was not the contract. What is said by counsel with reference to the purchase of other property appears plain enough and does not affect the question as to how much was the consideration to be paid for Dorne's interest. Whatever was paid necessarily came from the assets of the company by the sale of the reserved stock or by incurring a debt for the money, and so it would follow that Mr. Dorne's stock interest was chargeable with its proportion of whatever assets came to the company, and whatever was paid for other property.

III.

Another source of serious complaint by counsel for the plaintiff in error, is that when the arrangement was made for the transfer of this interest by Dorne, there was some undertanding that if the company did not carry out its agreement in delivering the 14,285 shares, he might at his option require a conveyance back of this interest in these mining claims. Counsel seem to treat this as though it was a matter for the defendant company; that it had the option instead of Mr. Dorne. It seems to us a sufficient answer to all that is contained in the argument of the counsel for the plaintiff in error upon this proposition to say that whatever there was with reference to this matter of re-conveyance, it was wholly at the option of Mr. Dorne, and when he failed to exercise that option it dropped out of the case. He chose to retain the part payment which had been made him and to require the company to pay the balance of the consideration in stock. It does not appear why he preferred this. Possibly this property may have in the meantime been encumbered by the company, either through liens or improvements, or mortgage to procure means to pursue the business of the company.

In any event, we repeat, all these questions of fact have been submitted to the jury and determined, and in this court the parties are concluded thereby.

IV.

All of the subjects of complaint made by counsel for plaintiff in error are grouped around the foregoing propositions, except the quest on relating to damages, and it seems to us sufficiently answered.

Certainly it cannot be denied that upon all the subjects essential to a recovery, there was at least a conflict in the evidence. Such being the case, neither the circuit court, sitting in lieu of the state supreme court, nor this court, can disturb the verdict on the ground of insufficiency of evidence.

V.

Upon the question of damages the evidence was addressed to the measure provided by the law of the state and former territory, where the contract was made, and where it was to be fulfilled. The stock was to be delivered to Mr. Dorne at Deadwood. The measure of damages is given in plain terms by the Civil Code, then and still in force. The sections pertaining thereto are quoted at length in the administrator's brief in case No. 260, to which we refer for this purpose and for all we think it necessary to say upon the question of damages.

VI.

One of the most earnest complaints made is that the court refused to strike out the testimony of the plaintiff, Victor Dorne, after the plaintiff's counsel had examined him and the defendant's counsel had cross-examined him with great liberality, and all without objection. Certainly under these circumstances, even if there had been

some objectionable features in his testimony, it was not error for the court to refuse to strike it out. It will be observed that the motion was to strike out all of his testimony upon certain subjects, and if some of it was competent as against an objection apt in time, then, of course, the motion for that reason also should not have been sustained. The assumption by counsel that a party cannot recover damages for a failure to deliver personal property simply because such property is not the subject of universal exchange, does not seem to us to be tenable.

## VII.

The counsel for the plaintiff in error also complains that there was such a variance between the allegations of Dorne, the plaintiff below, and the proofs, as to amount to an entire failure to sustain the plaintiff's cause of action. This contention if it had merit here, it will be observed, was for the first time presented to the appellate court. No suggestion of that kind was brought to the attention of the trial court either before or after the verdict. However, we do not observe the force of the suggestion from anything which appears in the transcript; but on the contrary, the proofs seem to be directed plainly and clearly to the allegations in the complaint, and the defendant in the court below tried the case upon the same theory.

Beside this is a matter of practice, and we apprehend this court will not review the court below upon that subject. By the rendition of the judgment the district court of the territory has in effect declared the proofs sufficient to sustain the allegations. The circuit court, assuming appellate jurisdiction, has come to the same conclusion. We apprehend nothing more need be said upon this point. The practice act of the Territory of Dakota, still in force, is as follows:

"No variance between the allegation in a pleading and the proof shall be deemed material unless it have actually so misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been misled the fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just." Dakota Code of Civil Procedure, 1877, § 138.

"Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs" Dakota Code of Civil Procedure, 1877, § 139. Farmer vs. Cram, 7 Cal. 135.

"The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Dakota Code of Civil Procedure, 1877, § 145.

Where the case made by the plaintiff's proof differs from the averments of the complaint, and defendant makes no objection to the introduction of the evidence on this ground the Supreme Court will not reverse the judgment. Marshall vs. Ferguson, 23 Cal. 66-70.

Waugenheim vs. Graham, 39 Cal. 169, 174. Peters vs. Faus, 20 Cal. 587, 591. Hayne on New Trial and Appeal, § 116, 117, 118, 119.

The difficulty with the argument of the learned counsel for the plaintiff in error is well illustrated in the concluding portion of his brief, wherein he asserts various facts which do not appear anywhere in the record. although he begs the pardon of the court for thus infringing a rule which ought to govern any presentation of any case. For instance, with some temper he calls the plaintiff in error, "a poor, experimental mining company, struggling for its existence, whose stock was absolutely without value in the market at all," and avers that "his (Dorne's) administrator comes into court to ask an affirmance of a judgment on a cause of action that did not belong to the man while living and the fruits of which did not inure to the benefit of his estate now that he is dead." Does it anywhere appear that his client, the defendant company is or was entitled to be characterized by its counsel in this injurious way, or that the defendant in error should be prejudiced in this court by statements of assumed facts which nowhere appear? However, as we have said, this illustrates the entire argument for the plaintiff in error, which is based mostly upon an assumption of facts and upon alleged objections, exceptions, etc., which did not occur and are not to be found in the transcript.

We think it not necessary to elaborate this brief as whatever appears in plaintiff's argument which seems of sufficient importance to meet, not answered herein, is considered in our brief in No. 260, to which we respectfully refer.

S. S. BURDETT,

G. C. MOODY,

EBEN W. MARTIN,

Counsel for Administrator of Victor Dorne, Deceased.

# In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 260.

SEBASTIAN KOENIGSBERGER, as Administrator of the Estate of Victor Dorne, deceased,
Plaintiff in error,

vs.

THE RICHMOND SILVER MINING COMPANY,
Defendant in error.

FROM DISTRICT OF SOUTH DAKOTA.

## Brief of Counsel for Defendant in Error.

A statement of this case is made in our brief in No. 220, in which The Richmond Silver Mining Company is plaintiff in error. Shortly after that company took out its writ of error, counsel for Dorne, then living, also asked for a writ, and upon Dorne's death substituted his admistrator here. The statement made in our other brief need not be duplicated here, nor will it be necessary to reproduce any of the evidence; as in our view the questions involved in this case, No. 260, are simple and the law applicable to them well settled.

Counsel for the administrator kindly hand us an advance copy of their brief, from which we find that

two of their original assignments are urged as error committed against the Dorne estate by the Circuit Court of South Dakota; first, that it erred in assuming jurisdiction of the case; second, that it erred in its conclusion that the original Territorial trial Court committed error upon the question of damages, and in refusing to affirm the judgment of that Court unless one-half of it was remitted. In support of the second proposition, counsel assume at considerable length to set out the record on the question of damages, and contend that the learned Circuit Court ought not to have found there was error in that record—this, too, after counsel's assenting to such a finding on the Court's part, and cheerfully remitting in writing one-half of the judgment to avoid the risk of a new trial. But we anticipate.

Our answers to these propositions are: (1) The Court was right in taking jurisdiction of the cause from the Territorial Court; (2) the Court was right in its finding that reversible error was committed in the trial Court, and (3) the judgment creditor assented to the finding and ought not now to be allowed to call it error. Considering them in their order:

## I.

### The Court was right in taking jurisdiction of the case.

This case had been tried in the Territorial District Court at Deadwood, an appeal taken to Territorial Supreme Court shortly before admission of the State

of South Dakota; and, before any steps were taken recognizing in any manner the jurisdiction of the State Supreme Court, a request was filed there under Sec. 23 of the Admission Act (25 U. S. Stats. at Large, p. 682) for the transfer of the record, files, etc., to the United States Circuit Court (Record, p. 133). We incline to the view that this was a purely *ex parte* matter, but the counsel for Dorne were given an opportunity to be heard upon the subject, and after full argument the request was granted, the State Court at the time announcing its opinion upon a careful review of the cases (Dorne vs. Richmond Silver Mining Company, 1 So. Dak. Rep., 20; 44 N. W. Rep., 1021). The case was thereupon transferred to the Circuit Court, and counsel for Dorne moved to remand. Again the question was fully argued, and the Court decided it had jurisdiction. The opinion is printed in the record, page 146.

The contention of counsel thus persistently urged in two courts, and finally insisted on here, is that the language of the act admitting South Dakota into the Union must not be construed to allow the transfer of any causes to the United States Court except those in which a Federal question is involved, for that any other construction would conflict with the Constitution. It is further contended that all existing general legislation on this subject was repealed by this act admitting the State of South Dakota.

The particular provision of the admission act under which the transfer in this case was requested is found in Sec. 23:

"That in respect to all cases, proceedings and matters now pending in the Supreme or District Courts of either of the territories mentioned in this act at the

time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts respectively shall be the successors of said Supreme and District Courts of said territory, and in respect to all other cases * * * the Courts established by such State shall respectively be the successors of said Supreme and District Territorial Courts, and all the files, records, indictments and proceedings shall be transferred to such Circuit, District and State Courts respectively; * * * but no writ, action, indictment, cause or proceeding now pending shall abate by the admission of any such State unto the Union, but the same shall be transferred and proceeded with in the proper United States Circuit, District or State Court as the case may be, provided * * * transfers shall not be made to the Circuit or District Courts of the United States, except upon the request of one of the parties," etc.

Secs. 21 and 22 are in harmony with this extract from Sec. 23.

The request was made as contemplated in this section, alleging diverse citizenship at the time the action was begun, and diverse citizenship as still existing (Record, p. 133). It was granted, and thereupon the United States Circuit Court "succeeded" to the conduct and management of the case. The corporation was a citizen of the State where created.

N. & L. R. R. Co. vs. B. & L. R. R. Co., 136 U. S., 356.

C. & N. W. R. R. Co. vs. Whitton, 13 Wall., 270.

We shall not attempt to follow counsel for the administrator through their lengthy argument. We are not here to deny that in the limitations of judicial

power enumerated in the Constitution the phrase "to controversies * * * between citizens of different States" has been construed not to include a controversy between a citizen of a Territory and a State. But counsel, as it seems to us, are urging a technical and strained construction that would do violence to the whole spirit of the law and of all past Congressional legislation in the case of admission of new States.

Counsel seem to assume that the United States Circuit Court is a constitutional court, and its powers and duties limited by the Constitution. But the language of Section I. of Article 3 provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." It has been held, accordingly, that both the Circuit and District Courts are statutory courts, and that Congress could grant them such powers and jurisdiction from time to time, within the limits of the power defined in Article 3, Section 2, as might seem wise and prudent.

See

Cary vs. Curtis, 3 Howard, 236, 245.
The Mayor, etc., vs. Cooper, 6 Wall., 247.
C. & N. W. R. R. Co. vs. Whitton, 13 Wall., 270, 288.
Case of Sewing Machine Companies, 18 Wall., 553.
Gaines vs. Fuentes, 92 U. S., 10, 17.

It will be seen that these cases declare the law to be that the United States Circuit Courts do not derive their judicial power from the Constitution, but from the acts of Congress, subject only to the constitutional limitations that, in cases where the judicial power of

the United States can be applied only because the case involves a controversy between citizens of different States, it rests entirely with Congress to determine at what time the power may be invoked and upon what conditions, whether originally in the Federal Court, or after suit brought in the State Court, and, in the latter case, at what stage of the proceedings, whether before issue joined or trial, by removal to a Federal Court or, after trial and judgment, upon appeal or writ of error.

In this view, then, it was perfectly competent for Congress to provide, as done in the act admitting South Dakota and other States into the Union upon certain conditions, that any causes pending in the courts of the Territories out of which those States were formed, pending at the time of their admission, which involved controversies between one of their citizens and a citizen of another State, or which were otherwise fit subjects of the exercise of judicial power by the United States Circuit or District Court, might be taken charge of and concluded in such court as the successor of the Territorial Court.

Another consideration enters into this controversy; the Territories are not States, but a mere species of dependent municipality subject to Congressional legislation and control.

Constitution, Art. 18, Sec. 3.
Am. Ins. Company vs. Center, 1 Peters, 511.
Bank vs. Yankton County, 101 U. S., 129.
Good vs. Martin, 95 U. S., 90.
Clinton vs. Englebrecht, 13 Wall., 434.
Benner vs. Porter, 9 Howard, 235.

The Territorial courts have been declared to be mere legislative courts, deriving their powers from the organic acts and other legislation of Congress and such

Territorial legislation as Congress authorized or permitted. Both appeals and writs of error were allowed from these courts to the Supreme Court of the United States, and in the case at bar, had the Supreme Court of Dakota Territory passed on the appeal before admission, an appeal could have been taken to this Court; the right existed before admission and it was preserved in the admission act. But the case resting in the Supreme Court of the Territory unheard, did the circumstance of admission deprive the parties of the right of review here, if requested? Clearly not.

It may be well to consider the earlier legislation of Congress upon the admission of Territories as States of the Union, and the construction given by this Court to such legislation, for the purpose of ascertaining the intent and meaning of the 23d Section of the act admitting South Dakota. It was long ago settled that, for the purposes of supervision and control, the Courts of the Territory are Courts of the United States, and their records are the property of the Government of the United States, and that, when a Territory was admitted as a State, its courts ceased to exist and the control of its records belonged wholly to Congress—the new State having no right to their custody and no power to direct or control the transfer of pending cases, except with Congressional consent express or implied (*i. e.*, if the State made provision for transfer and Congress said nothing, assent might be implied, as in Hastings vs. Johnson, *infra*). Unless Congress made some provision, then, for cases pending in Territorial Courts at the time of admission, they perished. Congress might, however, provide for the revival, or perhaps better say survival, of the cases by a transfer of those of Federal character and jurisdiction to the new

Federal Courts, and for those of State jurisdiction to the new State Courts. As to the first class, no State legislation could affect them; as to the second class, State co-operative legislation was necessary to render Congressional legislation effective; Congress could not compel the new State to take the cases by succession.

Hunt vs. Palao, 4 Howard, 589.
Benner vs. Porter, 9 Howard, 235, 246.
Webster vs. Reid, 11 Howard, 437.
Calkin *et al.* vs. Cooke, 14 Howard, 227.
Freeborn vs. Smith, 2 Wall., 160, 173.
Hastings vs. Johnson, 2 Nevada, 192.

Several of the States made provision in their Constitutions for the care of pending court business not provided for by Congressional enactment (see Florida Constitution of 1838, Schedule and Ordinance, Section 4; Kansas Constitution, Schedule, Section 5; Nevada Constitution, Schedule, Section 4; California Constitution, Section 2). But a farther pursuit of this subject is not necessary to our present inquiry.

The policy of Congress since 1847 has been to secure to litigants in the Territories after their admission as States not only the same right of review in the Supreme Court of the United States of cases both of Federal and non-Federal jurisdiction which they had previously possessed under the Territorial system, but also the same right of resort to the Federal tribunals which they would have possessed in cases of Federal cognizance had their Territory been a State with the usual Federal Courts at the time such cases were begun.

U. S. Revised Statutes, Secs. 567, 568, 702, 703, 704.

The origin and meaning of these statutes may be found in Hunt vs. Palao and other cases cited *supra*.

And when a defect in this legislation was discovered, as in the case of McNulty vs. Batty, 10 Howard, 72, in which the Supreme Court dismissed the writ of error on the ground that the case was pending in that Court when the Territory was admitted, and therefore did not come within the terms of existing acts, and there was no Court authorized by law to execute the mandate of the Supreme Court, the defect was remedied by appropriate legislation, and one case at least held until the amendatory act had passed, and jurisdiction was then entertained and disposition made of the case.

Freeborn vs. Smith, 2 Wall., 160.
Sheppard vs. Wilson, 5 How., 210.

Subsequently the existing acts were expended by judicial construction so as to make the term "District Court" mean "Circuit Court," where necessary to carry out the spirit of the legislation.

Express Co. vs. Kountze, 8 Wall., 342.

Section 567 provides for three different classes of cases brought to the Territorial Supreme Court prior to admission: (1) Cases pending in that Court from which writs of error or appeals could have been taken to the United States Supreme Court; (2) cases in which judgment had been rendered from which writs of error or appeals could have been but had not yet been taken to the United States Supreme Court; (3) cases in which judgment had been rendered and writs of error or appeal had been taken. In all such cases the records of the proceedings were directed to be transferred to the United States District Court for the new State. And by Section 568 it was made the duty of the District Judge to demand and compel the delivery of these records to him by the clerk or other per-

son having their custody. This would leave for consideration by the State Supreme Court only such pending, undetermined cases as could not under the Territorial system have been taken to the United States Supreme Court.

Cases in Class 1, above enumerated, were to be heard and determined by the United States District Court (Sec. 569), and from its judgment writs of error or appeal could be taken to the Supreme Court of the United States (Sec. 704); cases in the second and third class seem to be provided for by section 703.

The cases from a Territory reviewable by the United States Supreme Court at that time were (Sec. 702): (1) Cases where the value of the matter in dispute exceeded one thousand dollars; (2) cases where the Constitution or a statute or treaty of the United States was brought into question. These limitations have been narrowed by later legislation, but not to affect the case at bar.

We find no provision in the Revised Statutes for the disposition of any territorial cases except those pending in the appellate court. The original Statutes at Large seem to have provided for them. Doubtless upon the revision this was left to be provided for in the Enabling Act of each new State.

Counsel for the administrator evidently recognize the force of the decision in Express Co. vs. Kountze, 8 Wall., *supra*, and to escape it contend that the statute there construed was repealed by Section 25 of the act admitting South Dakota, and that under this act the Federal Court could not have had jurisdiction of this case had such Court existed at the time it was begun, because at that time Dorne was a citizen of a Territory. But the answer to that is if the Federal Court could

have existed it would not have been a Territory but a State, and Dorne would have been a citizen of such State and the party he was suing a citizen of another. So in the decision of the South Dakota Supreme Court it is said: "The right to transfer must be determined on the hypothesis that the State of South Dakota had been admitted into the Union, and the Federal Courts established therein, and the plaintiff a citizen thereof, at the time the action was commenced." It is counsel's own position, not ours, that involves a *reductio ad absurdum*, for they cannot indulge the presumption of the existence of Federal Courts and territorial government at the same time, and ought not to contend that the act shall be so construed.

The error into which counsel fall in their contention evidently arises from using the general removing acts as an illustration in construing this admission act. In passing upon the removal acts, Courts have frequently declared that the test of the jurisdiction of the Federal Courts is the citizenship of the parties when the action was begun. And they have been construed to require a showing of diverse citizenship, both at the time suit was brought and when the petition for removal was filed (Dillon on Removal of Causes, 130).

But counsel fail to see the distinction that exists. In this admission act Congress is not providing for the removal of causes at all, but for the revival, survival or continued existence of causes pending in the Territorial Court upon its admission. True, the latter part of the section uses the word "transfer," and the State Supreme Court, in its opinion in this case (44 N. W., 1021), uses the same word; but the more exact intention of Congress is expressed in the first part of the section:

"That, in respect to all cases, proceedings and matters now pending in the supreme or district courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, *shall be the successors* of said supreme and district courts of said territory; and, in respect to all other cases, * * * the courts established by such states shall, respectively, be the successors of said supreme and district courts."

It will be seen this does not purport to be a removal act at all—it provides merely for the successorship in the jurisdiction of pending Territorial cases, which would otherwise have died with the Territory—makes provisions for the cases pending in the Territorial District Courts, for which there was no provision in the Revised Statutes, and provision for cases pending in the Territorial Supreme Court, that in no wise conflicts with Sections 567, 568 and 569, and therefore, it cannot be said that they are repealed.

The case in Nebraska before referred to (Express Co. vs. Kountze, 8 Wall., 342), was considered under the provisions of the Florida Act (9 Stats. at Large, 212). The language of the Florida Act was: "In all cases of Federal character and jurisdiction, commenced in said Territorial courts, and in which judgments and decrees are rendered, or which are claimed to have been since pending therein, the records and proceedings thereof and the judgments and decrees therein are hereby transferred to the District Court of the United States," etc. The cause was begun and pending in a District Court to Nebraska Territory, and after admis-

sion was transferred to the United States Circuit Court because of the diverse citizenship of the parties. It was contended, as here, that a transfer could not be had except in cases of Federal jurisdiction by virtue of the subject matter (see brief of counsel). This was denied below and in the Supreme Court.

The cause of Baker vs. Morton, 12 Wall., 150, was begun in a District Court of Nebraska Territory, passed to judgment there, was appealed to the Territorial Supreme Court and pending there at time of admission, when it was transferred to the U. S. Circuit Court because of the diverse citizenship of the parties. This Court said, speaking by Mr. Justice CLIFFORD:

> "Whenever a Territory is admitted into the Union as a State the cases pending in the Territorial Courts of a Federal character or jurisdiction are transferred to the proper Federal Court, but all such as are not cognizable in the Federal Courts are transferable to the tribunals of the new State. Pending cases where the Federal and State Courts have concurrent jurisdiction may be transferred to either the State or Federal Court by either party possessing that option under the existing laws."

The admission act is very liberal—it provides for the United States Courts succeeding to all cases "whereof they might have had jurisdiction." This includes those which might have been begun there or taken there by removal.

Several cases illustrative and in point arose in Colorado. There the admission act was passed March 3d, 1876; March 14th the Constitution was framed; on June 26th the Act of Congress "to further the administration of justice in the State of Colorado," and creating the Federal Courts therein, was passed. Section 8 of this act was identical with our Section 23, so far as cases of Federal jurisdiction are concerned.

Under this section, as the only legislation on the subject, the Supreme Court of the State of Colorado refused to entertain jurisdiction of a cause pending at the time of admission, where plaintiffs were citizens of Illinois, and defendants citizens of New York and Colorado, unless both parties should invoke its action and submit the same to its judgment (see Mem. of Decisions, Gaffney *et al.* vs. Gillette, 4 Dillon, 264).

In the case of Ames vs. Railroad Company, 4 Dillon, 251, the right of survival under Section 8 of the Colorado act would have been squarely raised but for the fact that after the admission the party seeking the transfer had voluntarily invoked the aid of the State Court in several matters connected with the case, and this Court held to amount to a waiver of right to transfer. But in the course of the opinion of Judge DILLON (4 Dillon, 256) the acts of Congress to which we have adverted are reviewed, and their intent considered, and, instead of regarding Section 8 (our Section 23) as in any sense qualifying or repealing existing law, he declares the act has made "more specific and careful provisions as to the disposition of pending cases, whether in the Supreme Court of the United States or in the Supreme and District Courts of the Territory, than had been done by Congress in any other instance in providing for a change from Territorial existence to that of a State" (p. 258). The opinion clearly indicates the view of Judge DILLON that but for the waiver this case would have been a proper subject of transfer under the Colorado act, because of the diverse citizenship of the parties. And Justice MILLER adds:

"I concur in this opinion, in the first part of it fully (this discusses the early legislation of Congress and the meaning of the Colorado Act); in the latter part of

it, on the ground that the party now seeking to docket the case in the Circuit Court took active steps in the case *after he had the right to have it docketed in the Circuit Court.* But in the future application of the rule I should not accept silence or passive inaction in the State Courts as conclusive against a party of his election between the two Courts."

Bear in mind that in this case the plaintiffs were citizens of Massachusetts and the defendant a corporation created under the laws of Colorado Territory. Afterward, doubtless from a suggestion in Judge DILLON'S opinion, an attempt was made to get the case into the United States Circuit Court under the General Removal Act. This was unsuccessful (see 4 Dillon, p. 260); but Judge HALLETT, who pronounced the opinion (Judge DILLON concurring), finds no difficulty in construing existing law and Section 8 of the Colorado Act together:

" Congress has provided a special way of transferring causes on the admission of a State by general law (Revised Stats., Secs. 567, 569, 704), and also in this instance by the act establishing this Court, June 26th, 1876 " (p. 262).

Again, in the case of Gaffney *et al.* vs. Gillette *et al.*, 4 Dillon, 264, where the parties were of diverse citizenship, one of them a citizen of Colorado Territory and State, and the case pending on appeal in the Territorial Supreme Court at date of admission, and the parties by stipulation in writing invoked the jurisdiction of the State Supreme Court, tried the case there and after decision and remand to the lower Court tried to remove from there to the United States Circuit Court, Judge DILLON said: " We hold that defendants waived their right to a removal of the cause under the Act of Congress of June 26th, 1876, by their voluntary and

deliberate submission of the same to the Supreme Court of the State," clearly implying as in the other case that the right existed and but for the waiver it would have been recognized.

We think counsel for the administrator are mistaken in assuming that the general provisions of the Revised Statutes on this subject were repealed or at all affected by Section 25 of the admission act. An important public statute of long standing will not be held to be repealed except by express words or by strong and necessary implication. Repeals by implication are not favored. Such construction is given to two statutes on the same subject as to give effect to both if possible. Subsequent statutes do not abrogate former ones by containing different provisions on the same subject; they must be contrary to produce such an effect. A later statute which does not in terms repeal an earlier one on the same subject is not to be taken as a repeal by implication unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter (see cases cited in note to United States vs. Henderson, 20 Lawyers' Ed. U. S. Supreme Court Reports, 235).

But the provisions of the admission act standing alone are amply sufficient to sustain the jurisdiction of the United States Court assumed in this instance. The opinion of the learned District Judge is found at pages 146–151 of the Record, and carefully considers the question, citing from the cases already referred to in this brief, and reaching the conclusion that if the congressional legislation in reference to the survival of this class of cases is unconstitutional, then there is no provision for their survival and they must abate. To quote from the opinion: "This Court is the only Court

which has any jurisdiction of this class of cases pending in the Territorial Court, at the time of admission, where the conditions in the proviso to Section 23 of the enabling act have been observed. In order to give the State Court jurisdiction Congress, and possibly the State, must have conferred the jurisdiction. After the performance of the conditions of the proviso of Section 23 Congress has conferred exclusive jurisdiction on the Federal Courts in this class of cases, and the State in its ordinance has ratified the terms—consequently, either this Court has the exclusive jurisdiction or else no Court has jurisdiction."

Judge SHIRAS in another case (Herman vs. McKinney, 43 Fed. Rep., 689) concurred in the views entertained by the District Judge of South Dakota for which we are contending here ; and to the same effect are the decisions of the States of North and South Dakota (Miller vs. Sunde, 44 N. W. Rep., 301 ; Dorne vs. Richmond Silver Mining Co., 1 S. D., 20).

But counsel for the administrator greatly rely upon decisions made in the Ninth Circuit, to wit : two by Judge KNOWLES in Montana (Strasburger vs. Beecher, 44 Fed. Rep., 209 ; Dunton vs. Muth, 45 Fed. Rep., 390) ; two by Judge HANFORD in Washington (Nickerson vs. Crook, 45 Fed. Rep., 658 ; Carson vs. Donaldson, 45 Fed. Rep., 321) ; and one by Judge SAWYER in Idaho (Jackson vs. Bunker Hill and S. M. & C. Co.. 46 Fed. Rep., 417). From the last decision counsel quote at considerable length.

But counsel have evidently overlooked the fact that these decisions are not now the law in the Ninth Circuit. In the case of Blackburn *et ux.* vs. Wooding, decided by the Circuit Court of Appeals for that Circuit (56 Fed. Rep., 545), these decisions were expressly

overruled, and that Court, consisting of McKENNA, Circuit Judge, and HAWLEY and MORROW, District Judges, declared itself in harmony with the view of the Judges in the Eighth Circuit. No Federal question was involved in the case, and the jurisdiction depended entirely upon diverse citizenship of the parties. McKENNA, Circuit Judge, pronounced the opinion, and there was no dissent. He referred to the conflicting decisions in the Eighth and Ninth Circuits, and said:

"It will be observed that the statute makes jurisdiction depend on not what existed at the time of the admission of Washington into the Union, but what might have existed at the commencement of the case. The test is, what would have existed under the supposition of the existence of a Circuit Court of the United States? Manifestly, a State would have existed, and therefore citizens of a State. If a case had arisen between one of them and a citizen of another State, it would have been a controversy between citizens of different States, and the Circuit Court would have had jurisdiction under the laws of the United States, and there would have been a case to be transferred under Section 23. In his opinion in Johnson vs. Bunker Hill, etc., Co., *supra*, Judge SAWYER took a different view. * * * But we think the learned Judge overlooked the fact that the Circuit Court mentioned in the act is a court clothed with the judicial power under the Constitution, and not a Territorial Court, which Congress could create under its legislative power over the Territories. It was competent for Congress to create a court in the Territory of Idaho or Washington, call it a 'Circuit Court,' and give it what jurisdiction it pleased, but it could not invest such court with any part of the judicial power defined in the Constitution, and which the Circuit Courts are created to exercise. This was decided early in the case of Insurance Co. vs. Canter, 1 Pet., 546, and repeated in Benner vs. Porter, 9 How., 242. Territorial Courts, therefore, are not Courts of the United States, as was said by Chief-Justice CHASE in Clinton vs. Englebrecht, 13 Wall., 447. Hence, it necessarily follows that the existence of a Circuit Court supposes the existence of a State; and the record shows that under this supposi-

tion the parties to the case would have been citizens of different States, and it also shows that, at the time of the transfer, such diversity existed. The Circuit Court, therefore, did not err in refusing to remand the case, and this Court has jurisdiction."

## II.

**The Court was right in its findings that reversible error was committed in the trial Court upon the question of damages.**

The finding of the Court on this subject is found in the bill of exceptions at page 154 of Record, and we most cordially concur therein, though we excepted to the conclusion that the judgment of the trial Court could be affirmed for one-half the amount thereof, and insisted then, as we do now, that when the Court found that reversible error had been committed it became its duty to grant a new trial, and that no matter that the judgment creditor was willing to remit the other half to escape a new trial it was error for the Court to make the order in such form and deny us the new trial to which we were entitled upon the finding of reversible error. This question we have treated at some length in the brief upon our writ of error, and need not, therefore, argue it further here.

## III.

**The judgment creditor assented to the finding of the Court, that reversible error had been committed by accepting the terms by which he could escape a new trial, and filing his release in writing of one-half of the judgment with interest.**

This remitter of one-half the judgment may be found in the record, pages 152–3. It is entered without protest or reservation of any kind as a condition of the affirmance of the judgment for one-half of its amount and interest. This clearly foreclosed the right of Dorne to appeal or sue out a writ of error. He virtually said to the Court: "I accept your terms; if you will overrule the motion for a new trial and affirm the judgment for one-half the amount, I will remit and release the other half." Clearly he ought not now to be allowed to say the Court committed error in doing what he invited or was instrumental in inducing it to do.

An objection cannot be raised in this Court that has been waived in the Court below, or a ruling objected to to which the party consented there.

Richmond Mining Co. vs. Rose, 114 U. S., 570.

Little Rock Water Works Co. vs. Barrett, 103 U. S., 516.

*Ex parte* Chateaugay Ore & Iron Co., 128 U. S., 544.

Moelle vs. Sherwood, 148 U. S., 21.

Smith vs. Kimball, 21 N. E. Rep., 503.

Deering vs. McCarthy, 30 N. W. Rep., 813.

Chamberlain vs. Brown *et al.*, 41 N. W. Rep., 284.

Rice vs. Goodridge *et al.* 11 Pac. Rep., 91.
Lawrence *et al.* vs. Church, 128 N. Y., 334.
Pensacola Gas Co. vs. Pebley, 5 Southern Rep., 593.

The case of Smith vs. Kimball, 21 N. E. Rep., 503, was a case in Illinois. The parties had stipulated for a decree *pro forma* in the Court below; it was held in the Supreme Court that this was error, but the appellant, having requested entry of such a judgment, could not complain thereof. "A party cannot complain of an error which he has himself induced the Court to make, and so here, if appellant is adversely affected by an erroneous judgment, it is simply because he consented and requested that it be entered. He cannot assign error upon it."

Deering vs. Macarthy, 30 N. W. Rep., 813, was a case in Minnesota. When the case was called for trial, the defendant, upon an intimation of the District Court that his answer was insufficient, asked leave to amend, which was granted upon condition that he stipulated to try the cause before a Referee if plaintiff desired. Defendant excepted to this condition, but afterwards amended his answer and entered into a stipulation for the appointment of a Referee to hear, try and determine the action. The appeal was taken from an order denying defendant's motion to set aside the Referee's report and for a new trial. The appellate court affirmed the order of the Court below denying a new trial, and said: "Conceding in defendant's favor that the case was one in which he was entitled to a jury trial, and that the imposing of the condition was an abuse of judicial discretion, yet the stipulation is a clear waiver by him of any right to object in the premises. If he desired and intended to stand upon what he now

claims to have been his right—to a jury trial and to a review of the action of the Court in imposing the condition—he should not have executed a stipulation by which he must in contemplation of law be taken to have voluntarily submitted to the condition prescribed."

The case of Chamberlain vs. Brown *et al.*, 41 N. W. Rep., 284, arose in Nebraska. The first assignment of error was irregularity in the proceedings in permitting one Lee to be made a party defendant. The journal entry of the trial Court showed he was made a party with the consent of counsel for plaintiff, who was appellant. The Court says: "If, therefore, Lee was improperly made a party to the action, it was no error of the Court, as it was done by plaintiff's consent, and he cannot now question it."

In Little Rock Waterworks Company vs. Barrett *et al.*, 103 U. S., 516, a Receiver was appointed by the Circuit Court by stipulation of the parties; upon appeal this appointment was assigned as error. This Court said:

"However other parties may complain of this act, and there were other parties, none of whom have appealed, the present appellants are bound by their consent, in this Court as well as in the Court below, and cannot be heard to object to what they then agreed to."

In Moelle vs. Sherwood, 148 U. S., 21, it was held that where a rehearing was granted in the Circuit Court on the ground that there was no appeal to this Court, which was conceded to be true by the opposing party, it is too late for him after a decision of the case on the rehearing to object to the rehearing granted, on the ground that his concession upon which the rehearing was granted was untrue.

In Lawrence *et al.* vs. Church, 128 N. Y., 334 (28 N. E. Rep. 499), the doctrine of Whitehead vs. Kennedy, 69 N. Y., 462 (cited in our Brief in Case No. 220), is reaffirmed, and it is expressly declared that, where a plaintiff consents in writing to remit an excess as the condition of avoiding a new trial, he admits the judgment was to that extent erroneous, and shall not be heard in an appellate tribunal to insist that the original judgment was correct.

In Pensacola Gas Co. vs. Pebley, in the Supreme Court of Florida (5 Southern Reporter, 593), the Court below obliged the plaintiff to remit $300 from his verdict, otherwise it would be set aside and a new trial granted. The plaintiff's counsel remitted the $300 accordingly, and judgment was taken for the balance of $200. Both sides appealed; the plaintiff contending that the original verdict or award of the jury was reasonable; that the remittitur was entered by him under compulsion, and that the Court erred in compelling him to submit either to the remission of $300 or a new trial. The Court denied his appeal, and upon this point said (5 So. Rep., 596):

"The practice is that when the jury awards excessive damages the plaintiff may enter a remittitur for the excess. This is a voluntary act on the part of the plaintiff, and, after entering the remittitur, he is estopped from saying that it was entered under compulsion. The Judge was of the opinion that the damages were excessive, and the plaintiff, by remitting a part thereof, admitted that they were excessive."

The doctrine laid down in the foregoing cases is established as the rule everywhere. Plaintiff cannot remit, in writing, a part of his recovery and then appeal to a higher tribunal in the hope to save the

whole of his judgment. In this case, the Court found there was reversible error in the trial Court on the question of damages, but concluded that, if the plaintiff would remit one-half of the judgment he had recovered there, he might have a judgment of affirmance of the other half, otherwise, a new trial would be granted. The plaintiff in the case accepted the terms offered him by the Court, filed his remittitur in writing as suggested, and took his judgment of affirmance for one-half. Now, it does not lie in his mouth to say that that judgment was error to his prejudice. By that very act, he admitted what the Circuit Court of the District of South Dakota found, that there was reversible error in the trial Court upon the question of damages. But he cannot be allowed to ask here that the decision of the Circuit Court be reversed and his original judgment be restored and affirmed, or that an order be sent down to the Circuit Court to affirm it; the utmost that could be allowed him here would be to withdraw his stipulation or remittitur and consent to a new trial; to this we would raise no objection.

Our earnest contention is that the Circuit Court, in its finding, was right; that there was reversible error in the trial Court upon the question of damages; we claim further that there was reversible error committed there upon many other questions; we insist the Circuit Court had no power, upon finding reversible error of any kind in a case of this character tried to a jury and general verdict returned, to order an affirmance for any portion of the recovery on release of the balance, but that its duty was clear and imperative to order a new trial. We have cited a number of authorities upon this

proposition in our other brief, and stated there that any cases seeming to differ from them can readily be distinguished. We insist here as there that we are entitled to such new trial. We confidently believe that this Honorable Court will so find and direct the Court below to award it. Respectfully submitted,

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